SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 621

THE UNITED STATES, PETITIONER

vs.

KANSAS CITY LIFE INSURANCE COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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1 In the Court of Claims of the United States of America

No. 45430

KANSAS CITY LIFE INSURANCE COMPANY, A CORPORATION, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Petition

Filed April 17, 1941

To the Honorable the Court of Claims:

Count I

1. Comes now plaintiff, Kansas City Life Insurance Company, a corporation organized as a life insurance company under the laws of the State of Missouri, and authorized to do business in the State of Missouri and elsewhere, and with its principal office in Kansas City, Missouri, and for the cause of action against defendant, The United States of America, the plaintiff pleads:

2 2. That plaintiff is and was at the time any damage accrued as set out hereinafter the owner of the fee simple title to the following lands situated in the County of St. Charles, State of Missouri, to-wit:

Tract No. I

In the County of St. Charles and State of Missouri, to-wit:

1st. A tract containing 9.98 acres in the Northeast corner of the Southeast Quarter (SE¼) of Section 17, Township 47 North, Range 4 East, described as follows: Commencing at the Northeast corner of said Southeast Quarter (SE¼) of said Section 17, an old stone for corner; thence with the East line of said Section 17, South 15.438 chains to an old stone for corner; thence North 38 deg. 29′ West 20.12 chains to an old stone for corner on the quarter section line; thence South 88 deg. 28′ East 12.952 chains along said Quarter Section line to the place of beginning.

2nd. A part of the North Half (N½) of Section 17, Township 47 North, Range 4 East, described as follows. Commencing at the Northeast corner of said Section 17, thence South 2 deg. 5′ West 45.63 chains to an old stone for corner; thence with the quarter Section line North 88 deg. 28′ West 12.952 chains to an old stone

for corner; thence North 33 deg. 15′ West 12.64 chains to an iron fence post for corner; thence North 35 deg. 42′ West 17.77 chains to an iron pipe for corner; thence North 56 deg. 47′ West 7.73 chains to an iron fence post for corner; thence North 65 deg. 13′ West 9.37 chains to an iron pipe for corner; thence North 48 deg. 14′ West 5.84 chains to an iron pipe for corner; thence North 5 deg. 44′ West 5.64 chains to an iron pipe for corner; thence North 26 deg. 59′ West 2.69 chains to an iron pipe for corner; thence North 61 deg. 14′ West 3.10 chains to an iron pipe for corner in the North line of said Section 17; thence with said Section line South
3 88 deg. 44′ East 55.70 chains to the place of beginning, containing 150.694 acres. As the same are shown on plat and survey made by Fred R. Jacoby, County Surveyor of St. Charles County, Missouri, dated June 8, 1928, and duly recorded in the Survey Records of said County, to which reference is hereby made.

And being also the same land conveyed to Wiedmer Chemical Co., by deed of W. H. Wiedmer, et al, dated Feb. 23, 1927, and recorded in the Recorder's Office of St. Charles County, Missouri, in Book 154, Page 551.

Also the easement right and privilege of the use of a Twenty (20) foot road, the center line of which commences on the south side of the County Road running along the North line of Section 8, Township 47, Range 4 East, at a point equi-distant from the Northeast corner of the East Half (E½), and the Northwest corner of the East Half (E½), of said Section 8, thence running South and with the center line of said East Half (E½) of Section 8 and parallel with the East line of said Section 8, to a point in the North line of Section 17, Township 47, Range 4 East.

Tract No. II

Said land being and situate in the County of Saint Charles, and State of Missouri, to-wit:

The SW¼, except One (1) acre for School Lot on West line thereof, and the S½ of SE¼ of Section 6, Township 47, North of Range 4, East of the 5th P. M., containing 216.58 acres, more or less, (excepting therefrom 63.94 acres described as follows, to wit: A tract of land situated in the SW¼ of Section 6, Township 47 North of Range 4 East, and being more particularly described as follows: Beginning at a stone at the Southwest corner of said Section 6, thence North 3 degrees, 54′ East 29.151 chains along the West line of said Section 6 to a point in the County Road; thence South 49 degrees 48′ E. 6.419 chains to an iron pipe; thence following the South and West base line of Levee as follows: South

84 degrees 46' East 2.847 chains to an iron pipe, South 88 degrees 19' East 4.883 chains to an iron pipe, South 83 degrees 06' East 3.622 chains to an iron pipe, South 76 degrees 59' East 4.758 chains to an iron pipe, S. 69 degrees 39' East 2.126 chains to an iron pipe, S. 48 degrees 52' East 2.195 chains to an iron pipe, South 25 degrees 14' East 2.127 chains to an iron pipe, South 5 degrees 53' East 3.312 chains to an iron pipe, South 2 degrees 12' West 4.674 chains to an iron pipe, So. 21 degrees 47' West 1.84 chains to an iron pipe, South 37 deg. 14' W. 3.049 chains to an iron pipe, So. 48 degrees 19' West 1.58 chains to an iron pipe, S. 2 degrees 55' W. 1.695 chains to an iron pipe, So. 22 deg. 33' East 2.077 chains to an iron pipe, S. 35 degrees 30' East 3.07 chains to an iron pipe in South line of said Section 6, then following said south line of Section 6, North 88 degrees 18' W., 27.03 chains to place of beginning, containing 63.94 acres).

The NW¼ of Section 8, Township 47, North of Range 4 East of the 5th P. M., lying East of Fish Slough, containing 164.60 acres, more or less.

The SW¼ of Section 8, Township 47, North of Range 4 East of the 5th P. M., lying East of Fish Slough, containing 153.75 acres, more or less.

The Southeast Quarter (SE¼) of Section 8, Township 47 North of Range 4 East of the 5th P. M., containing 164.60 acres, more or less.

The NE¼ of Section 8, Township 47 North of Range 4 East of the 5th P. M., containing 164.60 acres, more or less.

The NW¼ of Section 9, Township 47 North of Range 4 East of the 5th P. M., containing 172.36 acres, more or less.

The SW¼ of Section 9, Township 47, North of Range 4 East of 5th P. M., containing 172.36 acres, more or less.

The SE¼ of Section 9, Township 47, North of Range 4 East of the 5th P. M., containing 172.36 acres, more or less.

5 The NE¼ of Section 9, Township 47, North of Range 4 East of the 5th P. M. (except 9.80 acres for Roadway and Railroad Right-of-way), containing 162.56 acres more or less.

All that part of the South fractional Half of Section 10 lying West of the Dardenne Creek; also the N½ of NW¼ of Section 15; also 6.76 acres described as follows: Beginning at the Northwest corner of the NE¼ of Section 15, running thence East along the Section line 10.50 chains to a point One (1) chains and 91 links West of a stone near the West bank of Dardenne Creek; thence South 45 degrees; West 16 chains and 50 links to a point on the East line of the Northwest fractional Quarter of Section 15; thence North 11.76 chains to the place of beginning; also 5 acres, more or less, situated in the SW¼ of the NW¼ of Section 15, beginning at a Willow Tree 18 inches wide in diameter, growing on the We t

bank of Dardenne Creek, running thence Southwesterly up the Dardenne Creek 157 feet and 6 inches; thence Westwardly parallel to a slough a distance of 691 feet and 8 inches, thence Northwardly at right angles a distance of 315 feet, thence Eastwardly at right angles a distance of 691 feet and 8 inches to the Dardenne Creek, thence Southwardly and up the Dardenne Creek 157 feet and 6 inches to the place of beginning, together with right-of-way along the bank of Dardenne Creek over the lands of Herman D. Elman to the County Road at Hayford Bridge across the Dardenne Creek; also a part of that part of the S½ of the NW¼ of Section 15 bounded and more fully described as follows: Beginning at a stake set for the Northwest corner of the S½ of NW¼ of Section 15, thence running East 20.60 chains to a stake from which a Honey Locust 8 inches in diameter is South 60 degrees, West 28½ links and a Pecan 8 inches in diameter is South 61½ degrees, East 49½ links, thence South 43 degrees East 11.33 chains to a stake, from which a Pin Oak 30 inches in diameter is South 59½ deg., East 43 links, thence South 35½ deg., West 6.51 chains to a stake, thence West 2.09 chains to a stake in the prairie, thence North 13.26 chains to the place of beginning, all in Township 47 North of Range 4 East of the 5th P. M., containing 336.06 acres, more or less.

The NE¼ of Section 16, also lots 9 and 10 being all of the SE¼ lying North of Dardenne Creek of Section 16, Township 47 North of Range 4 East of the 5th P. M., containing 260.03 acres, more or less.

The NW¼; Also Lots 11, 12 and 14 being the N½ of SW¼, and the SE¼ of the SW¼ of Section 16, lying North of Dardenne Creek, all in Township 47 North of Range 4 East of the 5th P. M., containing 287.77 acres, more or less.

That said tracts of land contain an aggregate of 2,522.38 acres, more or less.

3. That in June 1922, The Davis-Wellcome Mortgage Company lent to Leonard Hillis and Annie Hillis, his wife, Erle W. Thompson and May M. Thompson, his wife, and Lester T. Jackson and Elvene Jackson, his wife, the then owners of said real estate, the total sum of $150,000.00, in consideration of which said borrowers executed and delivered to said The Davis-Wellcome Mortgage Company, thirteen separate notes and first deeds of trust, which deeds of trust together cover all the lands above described.

4. That on August 4, 1922, for a valuable consideration, The Davis-Wellcome Mortgage Company, by written assignment transferred said deeds of trust and the notes secured thereby to Kansas City Life Insurance Company, plaintiff.

5 That on February 23, 1927, W dmer Chemical Company, a Missouri Corporation, acquired sa real estate by deed subject to the first deeds of trust hereinbefore mentioned.

7 6. That on the 9th day of July 1929, said Wiedmer Chemical Company conveyed to Frederick G. A. Bardenheier, subject to the first deeds of trust hereinbefore mentioned, the land described as Tract No. 1 in paragraph two hereof.

7. That on the 23rd day of June 1931, all of said loans hereinbefore referred to became in default as to both principal and interest and have remained so since that time.

8. That on the 12th day of May 1933, the said plaintiff, Kansas City Life Insurance Company, acquired by deed from Frederick G. A. Bardenheier and Virginia A. Bardenheier, title to the land described as Tract No. 1, in paragraph two hereof.

9. That on the 20th day of April 1934, plaintiff, Kansas City Life Insurance Company, entered into a contract for operation of real estate with said Wiedmer Chemical Company, under the terms of which said Wiedmer Chemical Company acknowledged that such loans were in default and said Kansas City Life Insurance Company was given possession of such real estate and the right to manage same, collect the income therefrom and apply same on the loans.

10. A copy of said Contract for operation of real estate is attached hereto and marked "Exhibit A."

11. That on the 10th day of June 1938, said plaintiff, Kansas City Life Insurance Company, acquired title to the land described as Tract No. 2, in paragraph two hereof by deed from Wiedmer Chemical Company.

12. That said tracts of land have been known and are

8 referred to in reports of engineers and proceedings before the Committee on Rivers and Harbors of Congress as a private drainage district called Wiedmer Chemical Company, private.

13. That by Act of Congress entitled, "An Act to facilitate the prosecution of works projected for the improvement of Rivers and Harbors," approved April 14, 1888, the Secretary of War was authorized to cause proceedings to be instituted in the name of the United States in any court having jurisdiction of such proceeding for the condemnation of any land or right-of-way needed to enable him to maintain, operate, or prosecute works for the improvement of rivers and harbors for which provision had been made by law.

14. That by Act of Congress, entitled, "An Act making appropriations for the construction, repair and preservation of certain

public works on rivers and harbors, and for other purposes," approved June 13, 1902, a board of engineers for rivers and harbors in the office of the chief of engineers, United States Army, and a system of improvements for rivers and harbors was provided. Such Act provided that there should be referred to said board of engineers all reports upon examinations provided for by Congress and all projects and changes in projects for works of river and harbor improvements and that such board of engineers should submit to the chief of engineers recommendations as to the desirability of commencing or continuing any and all improvements upon which reports were required. Such Act further provided that all reports on examinations and surveys authorized by law and all special reports ordered by Congress should in the discretion of the chief of engineers be reviewed by said Board of Engineers.

9 15. That by Act of Congress, entitled, "An Act authorizing the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," approved July 3d, 1930, improvements were adopted and authorized to be prosecuted on the Mississippi River between Missouri River and Minneapolis, Minnesota, and a 9 foot channel of said Mississippi River of width adequate for long haul barge service authorized. That the project authorized by such Act of Congress provided for the construction of locks and dams to raise the low water level of the river without substantially raising flood levels in order that a 9 foot channel might be provided.

16. That pursuant to said Act of Congress, the Secretary of War of the United States, through his officers, agents and engineers, on the day of 1934, began the construction of a dam, Number 26, at Alton, Illinois: That such dam was completed and put into service on or about the day of June 1938.

17. That the direct and immediate effect of the construction and operation of said dam was to raise the low water level of the said Mississippi River opposite these premises and back-water in Dardenne Creek to the amount of ten feet, and the average or normal summer stage about six feet. That previous to the erection and operation of such dam the drainage from plaintiff's real estate hereinbefore described, was carried away by said Dardenne Creek. That upon the erection and operation of such dam and the raising of the water level, such drainage was thereby prevented and water seeped into and under said land to such an extent that it was and is impossible to raise crops or utilize such land in any way for agricultural or other purposes.

10 18. This entire area is underlayed with water bearing sand extending from the Mississippi River channel to the Dardenne Creek channel and the upper surface of the sand is at

a higher level than the normal low water of the Mississippi River. The effect of raising the water level above this sand shuts off and prevents the underdrainage of this land, which it had in a natural state, into the Mississippi River and the Dardenne Creek at normal low water summer stages.

19. That the further direct and immediate effect of the construction and operation of said dam and the raising of the low water level of said Mississippi River opposite these premises was and is to cause the water to back into flow upon and seep into said premises.

20. That the reasonable market value of said real estate prior to the erection and operation of said dam was $100,000 per acre. That the effect of the erection and operation of said dam has been to take from and to deprive plaintiff of 1710 acres of said land described as:

E½ of NE¼;
A part of the S½ of W½ of NE¼;
A small tract in the SE Corner of NE¼ of SW¼;
E½ of SE¼ of SW¼;
SE¼; all in Section Eight (8).
All of Section Nine (9), except the NE¼ of NE¼;
S½ West of Levee, except approximately 50 acres
in NE Corner of said tract, all in Section Ten (10).
Part of N½ of Section Fifteen (15) West of Levee.
All of Section Sixteen (16) North of Levee.
All of Section Seventeeen (17) North of Levee.
All of said land being in Township Forty-seven (47) North,
Range Four (4) East of Fifth P. M., all as particularly shown in blue, in Plat attached marked "Exhibit B,"

rendering it of no value. That the reasonable market value of said 1,710 acres of land prior to the construction and operation of said dam was $171,000.00. That since the construction and operation of said dam and as a direct result of such construction and operation said 1,710 acres have no market value.

21. That the original plan of the chief of engineers, United States Army was that the loss to the lands involved in this case be remedied by tiling and drainage. That it was found that the tiling and drainage would cost more than the taking of the land.

22. That on April 30, 1935, a Committee on Rivers and Harbors of the House of Representatives adopted a resolution requesting the board of engineers on rivers and harbors to review the report on the Mississippi River between the Missouri River and Minneapolis, submitted in Rivers and Harbors Committee Document 234, 73d Congress, second session, with a view to ascertaining the

exact damages that might be caused to each of the levee and drainage districts bordering this river by seepage, backwater, and the increased cost of drainage caused by the prosecution of the existing project and probable capitalized cost of reimbursing each of said districts for such damage.

Pursuant to such resolution the district engineer on June 1st, 1936, made a report to the division engineer, upper Mississippi Valley, Division, St. Louis, Missouri. That a part of such report is as follows:

"Weidmer Chemical Co. District (private) is located about one-quarter mile from the right bank of the Mississippi River in St. Charles County, Missouri. The district is entirely en-
12 closed by levees and the embankment of the Chicago, Burlington & Quincy Railroad. Dardenne Creek adjoins the district on the south and east. During the 1929 high water the levees were overtopped and two crevasses were found. These crevasses were repaired in 1936. Drainage is removed by gravity, discharging into Dardenne Creek, which enters the Mississippi River at mile 227.3. This district has no pumping plant although one should be installed to provide adequate drainage under present conditions. Gravity drainage from the low-lying lands will be cut off when pool 26 is established. There are 1,254 acres of land which may be eliminated as agricultural land if funds are not expended for remedial works and 366 acres in addition which may be effectively drained by a combination of tiling and ditches. Upon the basis that the district installs a pumping plant, the average annual increased cost of operation is estimated at $2,339. It also will be necessary to construct additional tile drains and ditches at an estimated cost of $81,000. The total construction and capitalized annual cost of $139,475. The cost of acquiring 1,254 acres which may be damaged if funds are not expended for remedial works, and the cost of tiling and ditching 366 acres in addition is estimated at $93,540."

23. That on April 21st, 1937, the division engineer to whom such report was made, made a report to the chief of engineers, United States Army; that a part of such report is as follows:

TABLE 1.—*Estimate of cost of reimbursement for damage to levee and drainage districts due to operation of Mississippi River navigation pools*

Pool No.	Levee and drainage districts	Total capital cost of remedial measures	Cost of purchase of lowlands
26	Weidmer Chemical Co. district (Private)	139,475	93,540

24. That such district engineer made the following recommendation:

(a) "That the lowest figure shown in table 1 for each levee and drainage district be reported to Congress as the best possible estimate at this time of the capitalized cost of reimbursing the proper parties for damages to property in, and of, those districts, which may be caused by the prosecution of the existing navigation project, inviting attention to the fact that the cost of reimbursement is somewhat dependent upon the nature of the "authorizing legislation."

25. That on May 10, 1937, pursuant to such report the board of engineers for rivers and harbors made a report to the chief of engineers, United States Army. That such report contained the following recommendations (being paragraph 9 of such report):

"The pools to be formed by the navigation dams being built under the authorized project for the Mississippi River between the mouth of the Mississippi River and Minneapolis, will have an adverse effect on the internal drainage of certain of the levee and drainage districts bordering the river below Bellevue, Iowa. Plans have been developed to maintain proper drainage within these districts, after establishment of the navigation pools, by means of supplementary drainage works and pumping capacity where needed, and estimates have been prepared of the increase in the amounts of water to be pumped and the resulting added annual costs to the districts. The cost of the necessary remedial works plus the added annual costs capitalized at 4 percent represents the capitalized cost of rectification for each of the districts. Estimates have also been made of the value of lands in the various districts which would be rendered useless for agricultural purposes if no steps are taken to correct the effects of the navigation pools. It is found that in seven of the 25 districts under consideration the cost of the abandonment of the land for agricultural purposes is less than the estimated capitalized cost of rectification. The board concurs in the views of the district and division engineers that in these seven districts this cost should be taken as the measure of the losses suffered in these districts, and should be considered as the probable cost of reimbursing each of these districts for damages, and that in the remaining districts the capitalized cost of rectification should be considered the measure of the losses and accepted as the probable cost of reimbursing each of those districts for damages. The board therefore reports, in compliance with the committee resolution authorizing this review, that the best determinations practicable at the present time of the probable capitalized cost of reimbursing each of the affected districts for the dam-

ages resulting from the establishment of the navigation pools in the Mississippi River between the mouth of the Missouri River and Minneapolis are as follows:

Item No.	Pool No.	Levee and drainage districts	Nature of reimbursement	Estimated cost
23	26	Weldmer Chemical Co. (Private)	Retirement of lands	$33,540

26. That thereafter, on May 25, 1937, after such report by board of engineers for rivers and harbors for the War Department, the chief of engineers of the United States Army, in submitting the report of such board of engineers, to the Committee on Rivers and Harbors, House of Representatives, stated as follows:

"The Board of Engineers for Rivers and Harbors has fully considered the reports secured from the district and division engineers, and the data and informatoin submitted by local interests at a hearing held before the Board. It finds that the establishment of the navigation pools in the Mississippi River will have an adverse effect upon the internal drainage of 25 districts bordering the river. It considers that the plans and estimates developed by the district engineer represent the best determination practicable at this time of the remedial works required and the increased cost of operating the various districts. It concurs in the views of the district and division engineers that in the seven districts where the value of the land rendered unsuitable for agricultural use is less than the estimated capitalized cost of rectification, this value should be taken as the measure of the losses suffered in those districts, and should be considered as the probable cost of reimbursing each of these districts for damages, and that in the remaining districts the capitalized cost of rectification should be considered the measure of the losses and accepted as the probable cost of reimbursing each of those districts for damages. The Board presents in paragraph 9 of its report a list showing as nearly as can be estimated the exact damages that may be caused to each of the levee districts bordering this section by the river by seepage, backwater, and the increased cost of drainage that will be caused by the prosecution of the existing project, based on the probably capitalized cost of reimbursing each of said districts for such damages. The total capitalized cost of such reimbursement is found to be $1,993,276."

27. That such reports of district engineer, division engineer, board of engineers and chief of engineers was duly published and styled Document #34, 75th Congress, First Session, Committee on

Rivers and Harbors. That the portions of such reports set out above refer to the property of plaintiff above described.

28. That pursuant to submission to it of said Document No. 34, 75th Congress, First Session, Committee on Rivers and Harbors, the 75th Congress of the United States passed an Act, approved August 26th, 1937, entitled, "An Act Authorizing the construction, repair, and preservation of certain public works on Rivers and Harbors, and for other purposes." That such Act provides that certain works of improvement of rivers and harbors, and other waterways are adopted and authorized to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans recommended in the respective reports therein designated. That the provision of such Act as to the Mississippi River between the Missouri River and Minneapolis, Minnesota, was as follows:

"The existing project is hereby modified in accordance with the recommendations of the District Engineer in the report submitted in Rivers and Harbors Committee Document #34, 75th Congress."

29. That no condemnation or proceeding to acquire real estate described or any part thereof, or to acquire flowage rights therein has been brought by the United States of America, or by the Secretary of War, and that such Secretary of War and the Chief of Engineers of the United States Army have failed and refused to make any compensation to this plaintiff for such loss and depreciation.

30. This is a suit of a civil nature and constitutes a claim founded upon the Constitution of the United States Fifth Amendment, and upon Act of Congress being "An Act authorizing the construction, repair and preservation of certain public works on rivers and harbors and for other purposes," approved June 3rd, 1930, and referred to in paragraph 15 of this petition, and "An Act authorizing the construction, repair and preservation of certain public works on rivers and harbors and for other purposes," approved August 26th, 1937, and referred to in paragraph 28 herein, and said suit is founded upon an implied contract of the Government of the United States of America to pay value of land taken in a cause not sounding in tort and also involves the title of and loss to land situated in St. Charles County, in the State of Missouri. The amount of the claim herein, exclusive of interest and costs, exceeds the value of Ten Thousand ($10,000.00) Dollars.

31. That plaintiff is justly entitled to recover the amount claimed after allowing all just credits and offsets. That there has been no assignment or transfer of the claim set forth in this peti-

tion or any part thereof, or interest therein. That plaintiff is a citizen of the United States and has at all time borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government.

Wherefore, premises considered, plaintiff prays judgment against the Government of the United States of America, in the sum of One Hundred Seventy-one Thousand ($171,000.00), and for all other and further general relief to which the premises entitle plaintiff.

Count II

For further cause of action plaintiff adopts and makes a part hereof as if set out in full herein, paragraphs 1 to 31, of the first count of this petition.

That by reason of said law entitled, "An Act authorizing the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," approved August 26, 1937, the United States of America has authorized and consented to recovery from it by plaintiff for the loss suffered and has fixed by the law the amount of recovery at Ninety-three Thousand Five Hundred Forty and No/100 ($93,540.00) Dollars, for the 1,254 acres and 366 acres mentioned in report set forth in paragraph 22 of Count I of this petition. Said 1,254 acres and 366 acres are described as follows:

E½ of NE¼ of Section 8;
SE¼ of Section 8;
All of Section 9, except NE¼ of NE¼;
Part of S½ of Section 10 West of Levee;
Part of N½ of Section 15 West of Levee;
All of Section 16 North of Levee;
All of Section 17 North of Levee; all of said land being in Township 47 North, Range 4 East of Fifth P. M., and as shown in Plat attached hereto, marked Exhibit "C."

Wherefore, premises considered, plaintiff prays judgment against the Government of the United States of America, in the sum of Ninety-three Thousand Five Hundred and Forty and No 100 ($93,540.00) Dollars, and for all other and further general relief to which the premises entitle plaintiff.

Count III

For further cause of action plaintiff adopts and makes a part hereof as if set out in full herein, paragraphs 1 to 31 of the first Count of this petition.

Plaintiff further alleges that in order to place such land in the condition in which it was prior to the construction and operation of such dam it will be necessary to install a pumping plant to pump water from said land and to construct additional tile drainage and ditches. That the average annual increased cost of operation for such pumping plant will be $2,339.00, and the cost of such additional tile drains and ditches
19 will be $81,000.00. That the total construction cost and capitalized annual costs of such pumping plant in order to remedy the condition caused by the construction and operation of said dam will be One Hundred Thirty-nine Thousand Four Hundred Seventy-five and No/100 ($139,475.00) Dollars.

Wherefore, premises considered, plaintiff prays judgment against the Government of the United States of America, in the sum of One Hundred Thirty-nine Thousand and Four Hundred Seventy-five and No/100 ($139,475.00) Dollars, and for all other and further general relief to which the premises entitle plaintiff.

Count IV

For further cause of action plaintiff adopts and makes a part hereof as if set out in full herein, paragraphs 1 to 20 and paragraphs 29, 30, and 31, of the first count of this petition.

Plaintiff further alleges that by reason of the erection and operation of such dam and the raising of water levels as alleged said land was overflowed during the years 1938 and 1939, the water destroying One Thousand acres of wheat, or 15,000 bushels, in 1938, and Five Hundred acres of wheat, or 7,500 bushels in 1939. That the market value of wheat in 1938 at the time of such destruction was sixty cents per bushel, and that the marekt value of such wheat in 1939 at the time of such destruction was sixty cents per bushel. That the loss of said two crops was Thirteen Thousand Five Hundred and No/100 ($13,500.00) Dollars.

Wherefore, premises considered, plaintiff prays judgment against the Government of the United States of America, in the sum of Thirteen Thousand and Five Hundred and No/100 ($13,500.00) Dollars, and for all other and further general relief to which the premises entitle plaintiff.

20 Count V

For further cause of action plaintiff adopts and makes a part hereof as if set out in full herein, paragraphs 1 to 20, and paragraphs 29, 30, and 31 of the First Count of this petition.

Plaintiff further alleges that by reason of the erection and operation of such dam as alleged, said land was overflowed during

the year 1940 and plaintiff was unable because thereof to raise during such year any crops whatever on 654 acres of said lands in Sections 15, 16, and 17 of the tract hereinbefore described in paragraph 20 of the first count of this petition. That the reasonable rental value of said 654 acres for such year was $10.00 per acre, or $6,540.00.

Wherefore, premises considered plaintiff prays judgment against the Government of the United States of America in the sum of Six Thousand Five Hundred and Forty ($6,540.00) Dollars, and for all other and further general relief to which the premises entitle plaintiff.

Respectfully submitted.

HARRY B. HAWES.
711 Transportation Bldg., Washington, D. C.,
Attorney for Plaintiff.

21 [*Duly sworn to by D. R. Alderman; jurat omitted in printing.*]

22 *Exhibit "A" to Petition*

Loan 5275–87.

Contract for Operation of Real Estate

Whereas, Wiedmer Chemical Company, a Corporation of St. Louis, Missouri, is the owner of those several tracts of land described in Thirteen deeds of trust executed by Leonard Hillis and Annie L. Hillis, his wife; Erle W. Thompson and May M. Thompson, his wife; Lester T. Jackson and Elvene Jackson, his wife, to Commerce Trust Company, Trustee for The Davis-Wellcome Mortgage Company, said several tracts of land being situated in St. Charles County, State of Missouri. Said several deeds of trust being briefly described and identified by date, Volume and Page of record and the number of acres of land described in each as follows:

Date	Record, St. Charles County, Mo.	Acres
June 2nd, 1922	Vol. 138, page 316	216.58
June 2nd, 1922	Vol. 138, page 319	164.60
June 14th, 1922	Vol. 138, page 322	153.75
June 2nd, 1922	Vol. 138, page 325	164.60
June 6th, 1922	Vol. 138, page 329	164.60
June 7th, 1922	Vol. 138, page 332	172.36
June 8th, 1922	Vol. 138, page 335	172.36
June 8th, 1922	Vol. 138, page 338	172.36
June 8th, 1922	Vol. 138, page 341	162.56
June 8th, 1922	Vol. 138, page 348	260.03
June 14th, 1922	Vol. 138, page 344	336.06
June 10th, 1922	Vol. 138, page 351	287.77
June 15th, 1922	Vol. 138, page 355	158.69

Whereas, each of said loans secured by each of said several deeds of trust are in default, and it is the desire of the Wiedmer Chemical Company, A Corporation, hereinafter referred to as owner, and Kansas City Life Insurance Company, the owner
23 and holder of the several notes secured by the several deeds of trust above set out, hereinafter referred to as mortgagee, that said mortgagee take possession of said real estate and the personal property used in connection therewith and pledged by said deeds of trust, and that said mortgagee operate the said properties and farms and collect all proceeds, rents and income therefrom.

It is, therefore, agreed between said owner and the mortgagee that the said mortgagee take possession and full charge of all of the land described in said several deeds of trust, together with all personal property and equipment described in and pledged by said deeds of trust, and with right to operate, control and manage same in the manner as if it owned said real estate, with the right to lease same or operate through tenant or agent, and with the right to collect all proceeds, rents and income.

It is agreed between the parties hereto that all income from said farms shall, after deducting necessary expenses, be applied on indebtedness of owner to mortgagee, and mortgagee shall continue in control of said real estate, operate same and collect the proceeds until such proceeds after deducting expenses shall pay all delinquencies on said loans, including taxes and payments on principal.

Mortgagee assumes no responsibility in connection with this agreement except to account for all proceeds actually collected and to give credit for same on the indebtedness aforesaid after deducting expenses.

Mortgagee shall have the right to repair and rebuild any improvements, buildings, or fences, in its discretion, and shall be entitled to deduct from the proceeds the costs of such repair and rebuilding.

This contract shall not deprive mortgagee of the right to foreclose or exercise any other rights it may have to enforce its lien or the collection of its indebtedness.

The rights hereunder shall continue so long as there be any delinquency as to either taxes, interest or principal, or it may be terminated at any time at the option of the mortgagee.

24 In event there is money in the hands of mortgagee upon termination of this contract same shall be applied on principal after deducting any expenses.

In witness whereof, the said Wiedmer Chemical Company and the Kansas City Life Insurance Company have caused these pres-

ents to be executed by its duly authorized officers, this 20th day of April A. D. 1934.

WIEDMER CHEMICAL COMPANY,
By LEONARD HILLIS, *President.*
KANSAS CITY LIFE INSURANCE COMPANY,
By D. T. TORRENS, *Vice President.*

Attest:

HARRY C. FULKS, *Secretary.*

Attest:

DAN H. COX, *Assistant Secretary.*

STATE OF MISSOURI,
County of St. Charles, ss:

On this 20th day of April 1934, before me, appeared Leonard Hillis, to me personally known, being by me duly sworn did say that he is the President of Wiedmer Chemical Company, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Leonard Hillis acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

LISSA B. WILKINSON, *Notary Public.*

My Commission Expires: May 8, 1937.

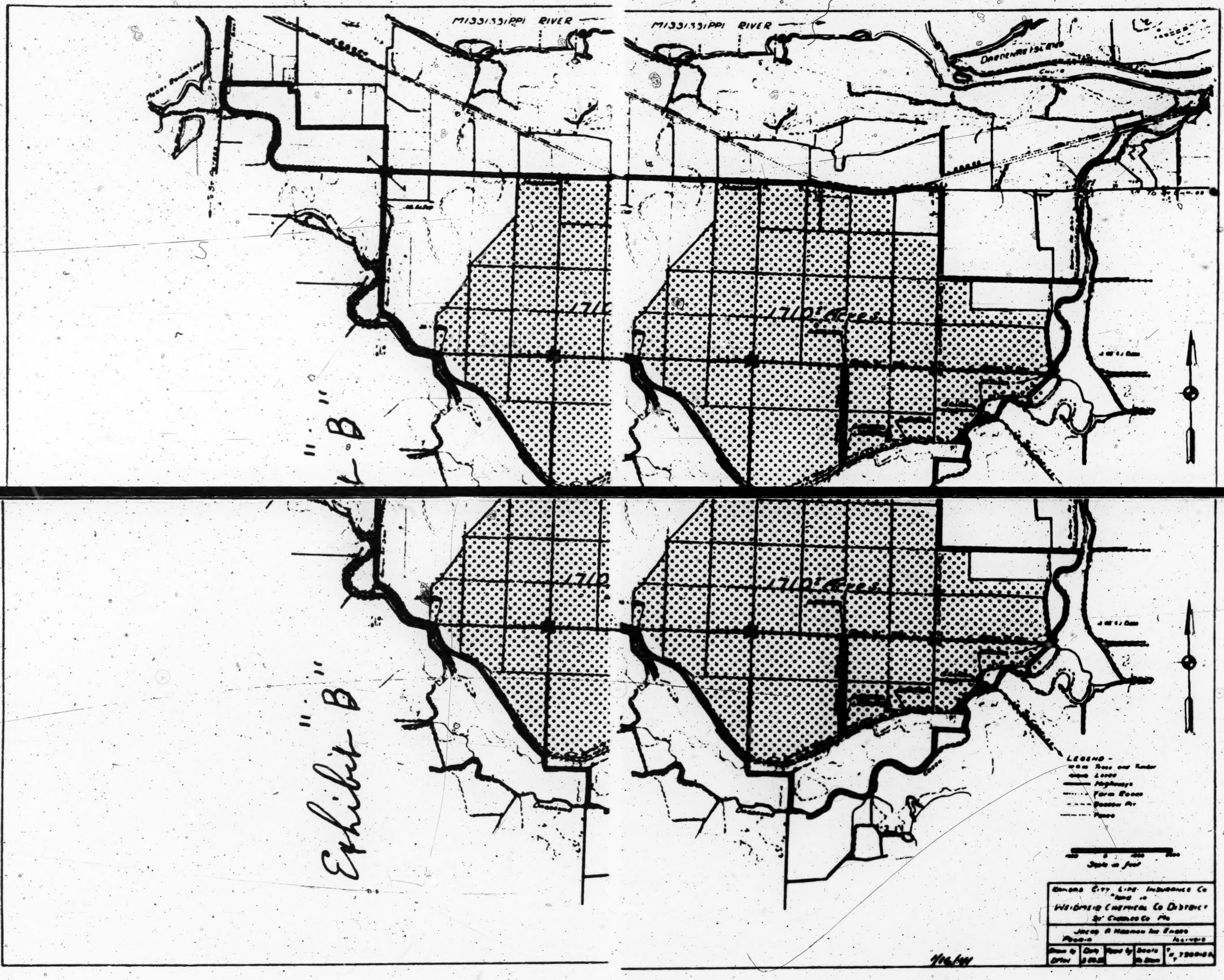
STATE OF MISSOURI,
County of Jackson, ss:

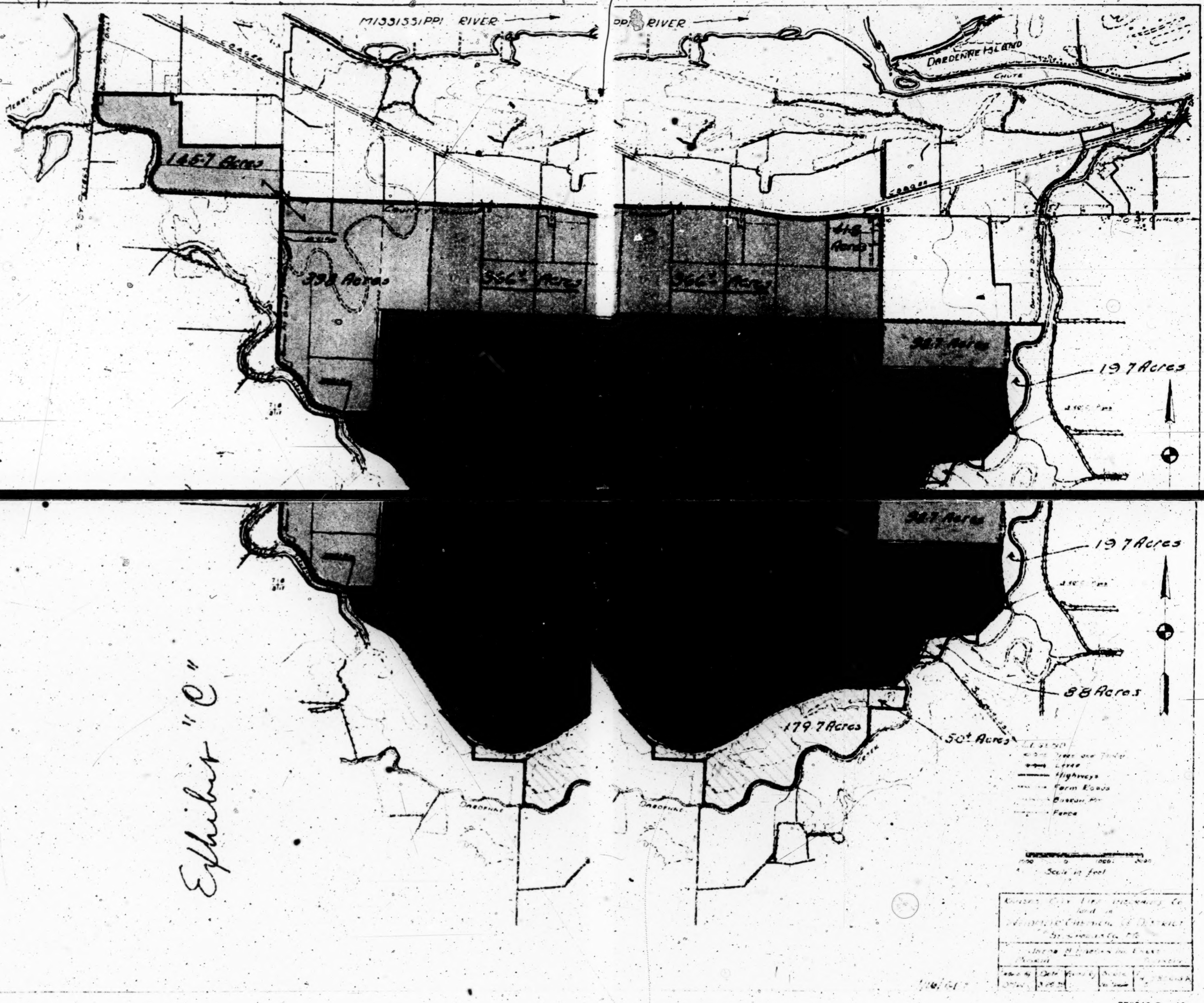
On this 23rd day of April 1934, before me, appeared D. T. Torrens, to me personally known, being by me duly sworn did say that he is the Vice President of the Kansas City Life Insurance Company, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed, sealed in behalf of said corporation by authority of its Board of Directors, and said D. T. Torrens acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

[SEAL] I. B. MARLATT, *Notary Public.*

My Commission Expires June 23, 1935.


MISSISSIPPI RIVER
MISSISSIPPI RIVER
DREDGE ISLAND
CHUTE
1710 Acres
1710 Acres
Exhibit "B"
LEGEND -
Scale in feet
Kansas City Life Insurance Co
Land in
Weldwood Chemical Co District
St. Charles Co. Mo.
Jacob A. Hassman Jr. Engrs
Peoria Illinois
7-16-49


MISSISSIPPI RIVER
MISSISSIPPI RIVER
DARDENNE ISLAND
CHUTE
1457 Acres
398 Acres
366½ Acres
366½ Acres
416 Acres
382 Acres
197 Acres
197 Acres
88 Acres
179.7 Acres
50½ Acres
DARDENNE
DARDENNE
Levee
Highways
Farm Roads
Fence
Scale in feet
Exhibit "C"

778640 O - 46

31 *General Traverse*

(Filed May 27, 1941)

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(S) FRANCIS M. SHEA,
Assistgnt Attorney General.

BT.
RR.

Argument and submission of case

On October 8, 1947, the case was argued and submitted on merits by Mr. Stanley Bassett and by Mr. Ray B. Lucas, for plaintiff, and by Mr. Ralph S. Boyd for defendant.

33 *Special findings of fact, conclusion of law and opinion of the court by Madden, J. Dissenting opinion by Witaker, J.*

(Filed December 1, 1947)

Messrs. Stanley Bassett and Ray B. Lucas for the plaintiff.

Mr. Ralph S. Boyd, with whom was Mr. Assistant Attorney General A. Devitt Vanech, for the defendant. Mr. William H. Churchwell was on the brief.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

Special findings of fact

1. Plaintiff, Kansas City Life Insurance Company, is an insurance corporation, organized under the laws of the State of Missouri and has its principal office in Kansas City. It brought this action to recover just compensation for the taking of 1,710 acres of land located in a private drainage district. Plaintiff claims that the taking resulted from the construction and operation of Lock and Dam No. 26 in the Mississippi River.

2. The land involved in this action is a part of the Wiedmer Chemical Company Drainage District, known locally as the Baldwin Farm. The District contains more than 2,500 acres of land and is located on Dardenne Creek, about one and one-half miles from its confluence with the Mississippi River. Dardenne Creek is a nonnavigable stream which empties into the Mississippi River about twenty-five miles above Dam No. 26. The farm is about

nine miles from St. Charles, Missouri, about twenty-five miles up the Mississippi River from the City of Alton, Illinois, and about thirty-five miles from the downtown district of St. Louis, Missouri.

34 3. On August 4, 1922, plaintiff purchased a loan secured by first deeds of trust upon the real estate described as Tract No. I and Tract No. II in plaintiff's petition, the loan being in the sum of $150,000. The two tracts contain an aggregate of 2,522.38 acres, of which the 1,710 acres in suit are a part. On June 23, 1931, the loans were in default as to principal and interest and have remained so since that time. On May 12, 1933, plaintiff acquired title to the land described in the petition as Tract No. I, and on June 10, 1938, plaintiff acquired title to Tract No. II.

4. Pursuant to authority contained in the Act of July 3, 1930, 46 Stat. 918, 927, as modified by Joint Resolution approved February 24, 1932, 47 Stat. 55, and the Act of August 30, 1935, 49 Stat. 1028, 1034, the United States constructed Lock and Dam No. 26 in the Mississippi River at Alton, Illinois. The dam was part of a project which was authorized for the purpose of providing a continuous nine-foot navigable channel from the head of navigation at Minneapolis, Minnesota, to the Missouri River, the stated depth to be secured by means of locks and dams between Minneapolis and Alton, Illinois, and by means of channel construction and dredging below the latter point. The construction of Lock and Dam No. 26 was begun on June 15, 1935, and the dam was completed on January 21, 1938. The raising of the pool was begun on May 1, 1938, but due to natural high water, filling of the pool was discontinued and open river conditions prevailed from May 25 to June 24, 1938. Full pool stage at the dam was first accomplished on August 8, 1938.

5. By resolution adopted January 29, 1932, the Committee on Rivers and Harbors of the House of Representatives requested the Board of Engineers for Rivers and Harbors to:

"* * * review the reports on survey of Mississippi River between Missouri River and Minneapolis, submitted in House Document Numbered 137, Seventy-second Congress, with a view to determining what additional damages may be caused to lands bordering this river by seepage and backwater, and the probable cost of making rectification thereof."

6. In response to the resolution, the Chief of Engineers, on March 8, 1934, submitted a report of the Board of Engineers of Rivers and Harbors, which was printed as Document No.

35 34, 73rd Congress, 2d Session. Along with the report, there was transmited a report of the District Engineer dated October 3, 1933, which was concurred in by the Board of Engineers for Rivers and Harbors and which, insofar as it pertains to plaintiff's claim, stated as follows:

"(7) Wiedmer Chemical Co. Drainage District is a privately owned district located in St. Charles County, Mo., opposite mile 621.6 to mile 625.5 in the Mississippi River. The district does not border the Mississippi River, being located south of the Chicago, Burlington & Quincy Railroad embankment. It is practically enclosed by a levee and the railroad embankment, except where it borders Dardenne Creek on the east. Drainage is removed from the district by gravity through 10 outlets. The land within this district lies well above the future average water surface elevation in the Mississippi River, during the proposed period of operation of Dam No. 26, as do also all of the gravity outlets. No adverse effect will be caused to this district by the proposed navigation improvement."

7. By resolution adopted April 30, 1935, the Committee on Rivers and Harbors of the House of Representatives requested the Board of Engineers for Rivers and Harbors to review the reports on the Mississippi River between the Missouri River and Minneapolis, Minnesota, submitted in Rivers and Harbors Committee Document No. 34, Seventy-third Congress, Second Session:

"* * * with a view to ascertaining as nearly as can be estimated the exact damages that may be caused to each of the levee and drainage districts bordering this river by seepage, backwater, and the increased cost of drainage that will be caused by the prosecution of the existing project, and the probable capitalized cost of reimbursing each of said districts for such damages."

Pursuant to this request, the District Engineer, the Division Engineer, the Board of Engineers, and the Chief of Engineers, submitted reports which were incorporated in Rivers and Harbors Document No. 34, 75th Congress, 1st Session.

8. The report of the District Engineer which appears in full in Rivers and Harbors Committee Document No. 34, 75th Congress,
36 was dated June 1, 1936, and discussed the entire lock and dam project on the upper Mississippi River. With particular reference to the lands in suit, the report provided as follows:

"103. Pool 26.—This pool will extend from mile 202.9, opposite Alton, Ill., to mile 241.4, a distance of 38.5 miles. The operation of this pool will be similar to pool 25, with a control point at Grafton, Ill., mile 218.0, at elevation 420.0, and the control point at the dam having a minimum elevation of 414.0 and the authorized pool elevation 419.0 as a maximum. Based upon available records, this pool will be unoperative 10 percent of the year because of high stages. Ten drainage or levee districts border on or drain into this pool. The location, assessed area, and estimated damage to each district are listed below:

District	Location			Assessed area in acres	Estimated damages		
	Bank	Limits (miles)			Annual	Capitalized cost	Cost of low areas
		Lower	Upper				
Wiedmer Chemical Co. district (private)	Right			2,860	2,339	[3] 139,475	[4] 93,540

[3] Includes $81,000 construction cost.
[4] Includes tiling and ditching of 366 acres in addition.

"112. Wiedmer Chemical Co. district (private) is located about one-quarter mile from the right bank of the Mississippi River in St. Charles County, Mo. The district is entirely enclosed by levees and the embankment of the Chicago, Burlington & Quincy Railroad. Dardenne Creek adjoins the district on the south and east. During the 1929 high water the levees were over-topped and two crevasses were found. These crevasses were repaired in 1936. Drainage is removed by gravity, discharging into Dardenne Creek, which enters the Mississippi River at mile 227.3. This district has no pumping plant although one should be installed to provide adequate drainage under present conditions. Gravity drainage from the low-lying lands will be cut off when pool 26 is established. There are 1,254 acres of land which may be eliminated as agricultural land if funds are not expended for remedial works and 366 acres in addition which may be effectively drained by a combination of tiling and ditches. Upon the basis that the district installs a pumping plant, the average annual increased cost of operation is estimated at $2,339. It also will be necessary to consruct additional tile drains and ditches at an estimated cost of $81,000. The total construction and capitalized annual cost is $139,475. The cost of acquiring 1,254 acres which may be damaged if funds are not expended for remedial works, and the cost of tiling and ditching 366 acres in addition is estimated at $93,540.

37

"119. Recommendations.—A comparison of the estimates of the capitalized cost of rectification of damages and the estimates of the cost of acquiring low lands within the districts, shows that in the seven following districts it is more economical to acquire the low lands:

Wiedmer Chemical Co. (private)

"It is therefore recommended that authority be granted the Secretary of War to acquire the low-lying lands in the above seven districts, for the United States in lieu of payment to the districts of the capitalized cost of maintaining their present drainage status and that the total estimated cost of $624,645 be made available therefor immediately."

This report was adopted and approved by the Division Engineer in a report dated April 21, 1937, by the Board of Engineers for Rivers and Harbors in its report dated May 10, 1937, and by letter of the Chief of Engineers dated May 25, 1937. In its concurring report of May 10, 1937, the Board of Engineers for Rivers and Harbors stated:

"9. The pools to be formed by the navigation dams being built under the authorized project for the Mississippi River between the mouth of the Missouri River and Minneapolis, will have an adverse effect on the internal drainage of certain of the levee and drainage districts bordering the river below Bellevue, Iowa. Plans have been developed to maintain proper drainage within these districts, after establishment of the navigation pools, by means of supplementary drainage works and pumping capacity where needed, and estimates have been prepared of the increase in the amounts of water to be pumped and the resulting added annual costs to the districts. The cost of the necessary remedial works plus the added annual costs capitalized at 4 percent represents the capitalized cost of rectification for each of the districts. Estimates have also been made of the value of lands in the various districts which would be rendered useless for agricultural
38 purposes if no steps are taken to correct the effects of the navigation pools. It is found that in seven of the 25 districts under consideration the cost of the abandonment of the land for agricultural purposes is less than the estimated capitalized cost of rectification. The Board concurs in the views of the district and division engineers that in these seven districts this cost should be taken as the measure of the losses suffered in those districts, and should be considered as the probable cost of reimbursing each of these districts for damages, and that in the remaining districts the capitalized cost of rectification should be considered the measure of the losses and accepted as the probable cost of reimbursing each of those districts for damages. The Board therefor reports, in compliance with the committee resolution authorizing this review, that the best determinations practicable at the present time of the probable capitalized cost of reim-

bursing each of the affected districts for the damages resulting from the establishment of the navigation pools in the Mississippi River between the mouth of the Missouri River and Minneapolis are as follows:

Item no.	Pool no.	Levee and drainage districts	Nature of reimbursement	Estimated costs
25	26	Wiedmer Chemical Co. (private)	Retirement of lands	$93,540"

9. By Act of August 26, 1937, Public No. 392, 75th Congress (50 Stat. 844, 848), Congress authorized certain works of improvement of rivers, harbors, and other waterways to be prosecuted under the direction of the Secretary of War and, with respect to the project involving Lock and Dam No. 26 on the Mississippi, provided as follows:

"Mississippi River between Missouri River and Minneapolis, Minnesota; The existing project is hereby modified in accordance with the recommendation of the District Engineer in the report submitted in Rivers and Harbors Committee Document Numbered 34, Seventy-fifth Congress."

10. Some time prior to the District Engineer's report of June 1, 1936, which is quoted in part above, the District Engineer apparently made a preliminary report which was adverse to plaintiff, because on January 25, 1937, plaintiff appealed in writing
39 to the Board of Engineers for Rivers and Harbors. In its written appeal, which is in evidence as plaintiff's exhibit No. 32, plaintiff stated in part as follows:

"The following statement is a summary and revision of the statements previously made to the U. S. District Engineer when preparing for his report dated June 1, 1936, and in which he stated that there would be no damages to this property, and from which conclusion this appeal is now being made.

"When the report of the U. S. District Engineer was made in June 1936, the two crevasses in the south levee caused by the flood of 1929 were still open, and the land was subject to backwater overflow. These crevasses have since been repaired, restoring the protection given by the existing levee."

The preliminary report of June 1, 1936, from which plaintiff appealed, is not in evidence and it was apparently superseded by the final report of the District Engineer, also dated June 1, 1936, which appears in Rivers and Harbors Committee Document No. 34, Seventy-fifth Congress. Neither the District Engineer nor any other of the officials who made the reports above referred to, testified at the hearing held in this case and, except as contained in the

reports, no evidence was presented with respect to the findings and recommendations which appear in these reports.

11. Plaintiff's farm varies in elevation between 422.7 feet and 428 feet above mean sea level. It is protected from flooding by backwater from the Mississippi River, on the north by the embankment of the C. B. & Q. Railroad which is at elevation 434, and on the east, south and west by a loop levee, the lowest elevation of which is 432.7 feet. The levee was constructed in 1903 and remained intact until the flood of 1929 when it was topped and crevassed at two points. These breaks were repaired in 1936. A cross levee extends from east to west across the lower one-third of the farm. Of the 1,710 acres in suit, 596.96 acres are south of the cross levee and the remainder are north of it. The farm is bounded on the south for about one-quarter of a mile and on the east for about one-half of a mile, by Dardenne Creek, which runs along the south border of the farm in a northeasterly direction and empties into the Mississippi about a mile northeast of the farm. At Dixon's Landing on the Illinois side of the Mississippi River, there
40. is a river gauge which has been in operation since 1930. This gauge is nearer plaintiff's land than any other gauge on the river. Dixon's Landing is about one mile above the mouth of Dardenne Creek and approximately 25 miles above the Lock and Dam 26. Gauge readings over the years have shown that the elevation of the river at Dixon's Landing is about the same as that at the mouth of Dardenne Creek. Prior to the construction of Dam 26, the mean low water mark in the Mississippi River at Dixon's Landing was about 410 feet above mean sea level and the ordinary high water mark was 420.4 feet. Before the dam was erected, the river stage exceeded an elevation of 419.6 feet about twenty-five percent of the time. The highest water recorded prior to 1934 was in 1929, when river stage reached an elevation of 434.5 feet. The average summer stage, June 21 to September 21, from 1930 to 1937 at Dixon's Landing was 413.9 feet.

12. The maximum authorized pool elevation at Dam 26 is 419 feet above mean sea level at the dam. When the water is held at elevation 419 feet at the dam, the pool elevation at Dixon's Landing which is 25 miles up the river, will vary from 419.1 to 422.5 feet above mean sea level, depending upon the volume of flow in the river. Exclusive of periods when the water was drawn down below normal operations, the average pool elevation maintained at the mouth of Dardenne Creek from August 1938 until May 1941 was 420.4 feet. When the river rises during flood stages, it is allowed to reach elevation 420 feet at Grafton, Illinois, which is the control point; then the gates at the dam are gradually opened and water is discharged underneath the gates. While elevation 420 at Grafton

is being maintained, the river stage at the dam drops from 419 to 414 feet. When the elevation of the river drops to 414 at the dam and is still 420 feet at Grafton, the gates are withdrawn from the water and the dam no longer exercises any control over the river. At that time open river conditions exist but the presence of the dam exercises a small retarding effect which increases the elevation of the water at the dam about six inches. This small increase is dissipated far below the upper region of the pool and does not affect the river stage at the mouth of Dardenne Creek, which is about 25 miles above the dam.

13. Since the highest pool elevation maintained by the dam at Dardene Creek is 422.5 feet and since plaintiff's land is protected by a levee to an elevation of 432.7 feet, the operation of defendant's dam and pool does not cause any flooding of plaintiff's land.

14. The natural drainage of plaintiff's farm, for both surface and subsurface water, is southward into Dardenne Creek. The surface of the land is slightly undulating and almost flat, having a general slope from the north to the south of less than 3 feet over a distance of one and one-half miles. The entire farm has a surface layer of heavy clay soil, sometimes known as gumbo, which varies in thickness from 5 to 16 feet. It is a soil of high fertility and when proper farming practices are applied and the soil is afforded adequate drainage, it is capable of producing good crops. When the soil becomes wet, however, it dries out slowly and special farming practices must be used even when it is properly drained. As a result of experiments and studies conducted by the Department of Agriculture and the agricultural colleges, the kind of farming practices which are necessary for successfully farming this type of land are now well established.

Because of the heavy texture of the soil, drainage of surface water alone will not enable the land to dry out sufficiently for timely planting and cultivation of crops. It is also essential that the excessive moisture in the soil be removed by drainage through the profile of the soil from the surface to the underlying stratum. The rate at which the profile drains the surface is dependent in large part upon the relative volume of the pore space in the soil. In a well-drained soil, the pore space averages from 15 to 25 percent of its volume, whereas in plaintiff's land the pore space is only 5 percent. This means that it is a critical soil in terms of getting the land dried out in time for the planting and growing of crops. Although vertical drainage from the surface through the profile of the soil on plaintiff's land is slow, it is effective and is conditioned by the depth of the water table below the surface. The rate of drainage diminishes as the height of the water table increases. When the water table is held to within three feet of the surface,

the soil remains cold and the seed rots or its germination is greatly delayed. Furthermore, the roots of most crops which can
42 be grown on this land, will, unless interfered with, extend at least three feet below the surface. If the underground water table is within from three to five feet of the surface, plants do not have a normal deep rooting because the air space is filled with water in the lower layers. If the air space in the soil is filled with water, the soil organisms, instead of converting and oxidizing organic material and liberating nitrates, converts nitrogen into ammonia which is detrimental to plant growth. In most soil, there is usually an upward movement of water by capillary action from an underground water table to the surface. Because of the heavy texture of the soil on this farm, however, the upward movement of underground water by capillarity is negligible, except when the water table is within one foot of the surface.

15. The surface drainage system on the Baldwin Farm was installed many years before defendant's dam was constructed. With the use of a grader, roadways were constructed around each 40-acre tract of land and small ditches, about one foot deep, were dug parallel to the roadways. Culvert pipes, 12 inches in diameter, were laid across the roadways in order to run the water from one 40-acre tract into the ditches of an adjoining 40-acre tract. There is a large ditch extending from east to west at the cross levee into which water from the small ditches drains. A main ditch carries the water from the north part of the property southward to a borrow pit on the landward side of the levee on Dardenne Creek. Prior to 1943 there were 14 or 15 outlet pipes extending through the toe of the levee on Dardenne Creek. These pipes were provided with wooden gates, which were opened for drainage of water into the creek when the river was low and were closed to prevent water from backing into the land when the river was high. In 1943, two 48-inch tubes were laid in the southeast corner of the land for draining water into Dardenne Creek; they are equipped with swinging doors so that when the creek is not against the tubes, the water drains out; when the water in the creek rises up to the level of the gates, they are closed to prevent the entrance of backwater on the land.

When the outlets into Dardenne Creek are blocked by high water in the river and in the creek, the accumulated surface water on the farm can be gotten rid of only by being pumped over the levee into the creek. In former years, three pumps
43 were in operation for this purpose but their use was discontinued some time prior to 1934.

16. Underneath the clay soil on plaintiff's land, there is a stratum of water-bearing sand, the top elevation of which varies

from 412 to 414 feet above mean sea level. The water in the sand is affected by the rise and fall of the Mississippi River and the water table under the land rises and falls in response to high or low water conditions in the river. The water level in the underground strata is also affected by rainfall on the land, because the sand stratum acts as a reservoir for water which drains vertically from the surface of the ground.

Beginning in 1934, a number of test wells were dug on the Baldwin Farm and from time to time observations of the water table were made and recorded. It was found that when the river was low, the water table under the land was also low and when the river rose, the height of the water table increased, but the water table was always higher than the river except during the dry summer months when vegetation was extracting the water. In general, the water table under the land prior to the construction of the dam was at an elevation of from 3 to 4 feet above the river stage at Dixon's Landing. The height of the water table varied with the slope of the land, the lower areas having a higher water table. At that time, the mean low water mark of the Mississippi River at Dixon's Landing was from 8 to 10 feet lower than the elevation at which the river has since been maintained at that point by the operation of the dam.

17. The bed of Dardenne Creek varies in width from 25 to 30 feet. The elevation of the bed of the creek opposite plaintiff's farm is from 410 to 413 feet above mean sea level. The depth of the channel, or the distance from the bed to the top of the creek bank, is from 12 to 14 feet. The elevation of the water in the creek on the low side of plaintiff's farm corresponds approximately to the elevation of the river at Dixon's Landing and the water in the creek rises and falls with changes in the river stages. Prior to the time that Dam 26 was built, the Mississippi River in the vicinity of plaintiff's land was subject to frequent floods. Usually during the spring floods, the river stage exceeded an elevation of
419 feet above mean sea level and this condition has not
44 changed since the dam has been built. Prior to the operation of Dam No. 26, however, the water in Dardenne Creek was only two or three feet deep, except during floods on the Mississippi or immediately after heavy rainfall on the watershed of the creek.

A cross-section of the levees on plaintiff's farm and a detail of the outlet drains located at the toe of the levee on the creek are shown in defendant's exhibit 7, which is made a part hereof. These outlet drains, which were placed beneath the levee at the creek and which serve to drain the surface water into Dardenne Creek, are at an elevation of approximately 420 feet above mean sea level.

Of the land involved in this suit, 70 acres are between elevations 422.7 and 423 feet; 818 acres lie between elevations 423 and 424 feet; 541 acres are between elevations 424 and 425; 238 acres are between elevations 425 and 426 feet and 43 acres are above 426 feet. The elevation of the land and of the outlet pipes into Dardenne Creek was, before the building of the dam, considerably higher than the level of the water in the creek, except during periods of high water. In the years prior to the operation of the dam, therefore, it was possible for both the surface and the underground water to drain off plaintiff's land into the creek and thence into the river.

18. The average pool elevation which has been maintained at the mouth of Dardenne Creek by operation of Dam 26 is 420.4 feet, and the elevation of the water in Dardenne Creek adjacent to plaintiff's farm has been raised from six to seven feet above the previous normal level. As a result of the operation of the dam, the surface of the water in the creek has been raised so that the creek water now backs into some of the outlet pipes in the plaintiff's levee, thereby obstructing and delaying the drainage of surface water from plaintiff's land. In addition, by maintaining the surface of the water in the creek to an elevation of 420 feet or more above sea level, the drainage of the underground water from a large portion of the plaintiff's farm has been almost entirely shut off. Prior to the construction of the dam this underground water drained through the sand strata under the land into the creek, which was normally only 2 or 3 feet deep at that time.

19. In the *District Engineer's report of June 1, 1936*, which appears in Rivers and Harbors Committee Document No. 34, 75th Congress (finding 8), it was stated that gravity drainage from the low-lying lands on plaintiff's farm would be cut off when pool No. 26 was established. The record does not disclose the extent to which the operation of Dam 26 obstructs or delays the drainage of surface water from the Baldwin Farm and there is no satisfactory proof with respect to the character or the cost of the additional drainage and pumping facilities which will be required to offset the condition created by the operation of the dam. However, under controlled river conditions, the water is held on the land after a rain for longer periods than was formerly the case and it will be necessary to provide additional drainage and pumping facilities in order to farm the land.

While floods occurred on the Mississippi and on Dardenne Creek prior to the erection of the dam with about the same frequency as they have since occurred, the river is not now allowed to drop to the low stages which existed in former years and the flood waters in the creek recede much more slowly than before. Prior to August 1938, the river stage at Dixon's Landing after floods dropped down

to an elevation averaging from 410 to 412 feet. Records of the river stages during those years reveal that there was almost always several months at the end of the year and about three months at the beginning of the year when the river stage was at an elevation of 410 feet or below. Under those conditions, an opportunity was provided for draining the surface and subsurface water from plaintiff's farm sufficiently for the planting, cultivation and harvesting of crops. Since the dam has been in operation, the conditions and the period of time, formerly available for draining the land and drying the soil, no longer exist.

20. As a result of the river stage being controlled by the operation of the dam, the water table under plaintiff's land is from four to five feet higher than it was during the low stages of the Mississippi prior to the erection of the dam. Under controlled river conditions, the water table beneath plaintiff's land has been raised to an elevation varying from 420.5 feet to 422 feet, or an average of from one to two feet higher than the controlled river stage at Dixon's Landing. The drainage of the underground water from beneath a large area of plaintiff's land has almost ceased.
46 On some portions of the land, vertical drainage from the surface to the underlying sand stratum has been cut off and on other portions it has been greatly retarded as a result of the increased height of the water table.

21. The effects of the operation of the dam became apparent within a short time after the full pool stage was obtained on August 8, 1938. After a rain, the surface of the soil dried out much more slowly than before and the drainage ditches did not carry off the water as readily. Excessive moisture was retained in the soil and planting of crops was delayed. Even when the surface appeared to be dry, the ground underneath was wet and would not support tractors and other farm machinery, which became mired down and had to cease operations. Seed planted on some portions of the land failed to germinate and would not. It was not possible to follow a proper crop rotation program. Because the soil was often too wet for planting some crops, it was necessary to substitute other crops which mature in a shorter time.

22. In 1946, a comparative yield measurement was made of corn grown at various elevations on plaintiff's land. It was found that the corn grown at an elevation of 425 feet or more above mean sea level produced from eighty-five to ninety-four bushels per acre. The yield of corn grown at an elevation of 424 feet was lower than that on the higher ground and its moisture content was greater. The computed yield of corn grown at an elevation of 423.5 feet was only 15.4 bushels per acre. Its growth was stunted and the ears were small. Its moisture content was much too high for cribbing or husking.

On the higher ground, the corn was better rooted and the roots were not deteriorated like those growing at a lower elevation.

23. The evidence regarding crop production on the land in suit, during the periods before and after the operation of defendant's dam, is incomplete and indefinite. However, it does appear that there was sharp variations from year to year in crop yields and income. Local farmers, who have resided in the area for many years, recalled that several bumper wheat crops were produced on the farm between 1905 and 1925 but there were no records available for those years. While no production or income figures
47 were shown for the years from 1925 to 1931, it was generally a period of low prices and poor yields. The owners during that time made an unsuccessful attempt to grow rice on a part of the land.

Plaintiff's books show the gross rent which it received annually from the entire 2,500 acre farm from 1934 to 1945, inclusive, but records were not kept separately for the 1,710 acres involved in this suit. During the five year period from 1934 through 1938, the rental received by plaintiff from crops produced on the farm varied from a low of $1,958.48 for the year 1938 to a high of $8,300.56 for the year 1934, or an average of $3,897.11 per year. The average gross crop rental received by plaintiff from 1939 to 1945 from the entire farm was $1,907.67, varying from $406.33 in 1943 to $4,786.65 in 1941.

In November 1946, when the hearing in this case was held complete crop returns for 1946 were not available. It was a favorable year for the production of crops in the area and most of the land north of the cross levee had been planted. At the time of the hearing, it appeared that the crops were much better than those produced in 1938.

Crop production and income received from the operation of the Baldwin Farm have been influenced by a number of factors, including proper maintenance of drainage structures, the amount of rainfall, the kind of farming practices used, the managerial ability of the farm operators, and the prices received for agricultural commodities. During the period from 1938 to 1943, the drainage facilities on the farm were not properly maintained and at times were filled with weeds and clogged with debris, but such facilities were well maintained from 1943 to 1946. From 1938 through 1945, the farming land was rented to tenants on a share basis and there is no proof regarding their managerial ability or the type of farming practices which they applied on the land. It is a matter of common knowledge that prices received by farmers for farm products were considerably higher from 1939 to 1946 than during the period from 1934 through 1938.

24. Plaintiff's exhibit No. 12 and defendant's exhibit No. 4, which are made a part hereof, are maps of the land in suit showing the acreage segregated according to various elevations above mean sea level. Of the 1,710 acres in suit, 596.96 acres are situ-
48 ated south of the cross levee and include the largest portion of the farm lying at the lowest elevation. Prior to August 8, 1938, this acreage had a lower market value than any other part of the land covered by plaintiff's claim. The evidence regarding the use and productivity of this tract before 1938 is vague and uncertain. While there was some crop production on a part of this land before 1938, it was not farmed with any regularity.

Of the 596.96 acres, 294 acres are located at or below an elevation of 423.5 feet above mean sea level. The underground water table beneath this acreage, especially during the planting season, was so near the surface even in the years prior to 1938 that its capacity for crop production was negligible. This, together with the fact that the land south of the cross levee has always received run-off water from the higher ground above, leads to the conclusion that the 294 acres had no value as agricultural land prior to August 8, 1938. The highest and most profitable use for the land was as a duck-hunting preserve and its value has not been diminished as a result of the operation of defendant's dam.

Of the remaining 302.96 acres south of the cross levee, 267 acres lie between elevations 423.5 and 425 feet and 35.96 acres are above elevation 425. Prior to August 8, 1938, the date on which full-pool stage above Dam 26 was first obtained, this 302.96 acres had a limited use for agricultural production, but there is no satisfactory proof of the exact amount by which the operation of the dam impaired its market value. A reasonable estimate of the amount by which it value was reduced by August 8, 1938, as a result of the operation of Dam 26, is the sum of $1,694.60.

25. On June 30, 1945, after the filing of plaintiff's petition in this suit, plaintiff granted to a syndicate of duck hunters an option to purchase 563.6 acres of the 596.96 acres in suit south of the cross levee at a price of $30.00 per acre, or a total of $16,908.00. The option was accepted by the purchasers on June 29, 1946, and the land is to be conveyed, subject to a reservation by plaintiff of the right to retain any amount recovered in this suit, and subject to certain other reservations which are not material here.

26. Included in plaintiff's claim are 1,113.04 acres of land which are located north of the cross levee. Of this acreage, 385
49 acres are situated at or below an elevation of 424 feet above mean sea level. The value of this 385-acre tract has been reduced more by the operation of defendant's dam than any other portion of the land in suit. The underground water table has been raised to within 3 feet of the surface of this

land and its drainage, for both surface and subsurface water, has been obstructed to a considerable extent. As a result, its market value has been reduced by more than one-half of its former value. By August 8, 1938, the market value of the 385 acres of land had, as a result of the construction and operation of defendant's dam, been impaired by the sum of $13,475.00.

27. Four hundred and twenty acres of the land in suit north of the cross levee lie at an elevation between 424 and 425 feet. This land has been affected by the operation of defendant's dam, but it has not been damaged as much as the tract of 385 acres dealt with in finding 26. The land is more difficult to farm than before and dries out more slowly after a rain. Unless additional drainage facilities are provided, crop yields will be reduced below what it was capable of producing prior to August 8, 1938. As a result of the construction and operation of defendant's dam, the market value of this 420 acres of land had, by August 8, 1938, been reduced by the sum of $7,350.00.

28. The remainder of the land covered by plaintiff's claim is at an elevation of 425 feet or more above mean sea level. Under controlled river conditions, the underground water table is more than three feet below the surface and it is the best drained portion of the entire area in suit. Although the testimony is conflicting, it has not been shown by a preponderance of the evidence that the market value of this land has been affected by the construction and operation of Dam No. 26.

29. The privilege exercised by the Government, for which the plaintiff is given compensation in this suit, is the privilege of permanently maintaining Lock and Dam No. 26 at their present height, and operating them in such a manner as to fulfill the purposes of their construction and other purposes which may develop in the future and do not greatly vary from present purposes.

50 *Conclusion of law*

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover $22,519.60.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of twenty-two thousand, five hundred nineteen dollars and sixty cents ($22,519.60).

Opinion

MADDEN, Judge, delivered the opinion of the Court:

The plaintiff sues to recover compensation for harm allegedly done to the plaintiff's interests by the construction by the Govern-

ment of Lock and Dam No. 26 in the Mississippi River near Alton, Illinois. The suit relates to 1,710 acres of land owned by the plaintiff, lying near the Mississippi River, and bounded on the north by a railroad embankment and on the east, south, and west by a loop levee. Before the construction of Lock and Dam No. 26, the land, though flat and low, was several feet higher than the normal surface of the water in the Mississippi and in Dardenne Creek which passed by the plaintiff's land and emptied into the river a short distance away. The land was in a private drainage district and was ditched and tiled, and had large tubes passing through the levee to drain surface water into the creek. Since it was a few feet higher than the usual water level in the creek, its underground water also drained into the creek.

The construction of Lock and Dam No. 26 raised the level of the water in the river and the creek, when the pool behind the dam was filled in 1938, to 420.4 feet above mean sea level, which was approximately the altitude of ordinary high water level before the construction of the lock and dam. We have found that the consequence of this raising of the water level in the creek has been to shut off the flow of some of the tubes leading through the levee and thereby prevent the surface water from draining off some of the land. A more serious consequence, however, has been that it has prevented water in the strata underneath the plaintiff's land from draining away, thus keeping the underground water within one, two, or three feet from the surface of different portions of the plaintiff's land, thereby impairing its value for farming.

51 The plaintiff justifies its suit first, as a claim arising out of an Act of Congress and second, as a claim founded upon the Constitution for just compensation for a taking of its property. In support of its first theory the plaintiff points to the reports of the Army Engineers relating to the effects upon nearby lands of the construction of the series of Locks and Dams in the Mississippi River, including Lock and Dam No. 26. Our findings 5 to 11 relate to these reports. These reports show that the Army Engineers thought that it would be cheaper for the Government to acquire ownership of some 1,254 acres of the plaintiff's land and tile and ditch 366 additional acres which would be damaged by the proposed project than to pay the cost of keeping all of the land in use as agricultural land. The plaintiff then points to the Act of August 26, 1937, Public No. 392, 75th Congress, 50 Stat. 844, 848, in which Congress authorized certain rivers and harbors work, and, with respect to the project involving Lock and Dam No. 26, provided:

"Mississippi River between Missouri River and Minneapolis, Minnesota: The existing project is hereby modified in accordance with the recommendation of the District Engineer in the

report submitted in Rivers and Harbors Committee Document Numbered 34, Seventy-fifth Congress."

This is all the legislation to which the plaintiff can point. The Government did not, in fact, purchase or acquire by eminent domain a portion of the plaintiff's land, as the Army Engineers had recommended, or ditch and tile another portion, as they had recommended. It just went ahead and built its lock and dam. The plaintiff still owns its land. We think that the legislation quoted above, while it might have constituted an authorization to acquire some of the plaintiff's land by eminent domain and to spend money in tiling and ditching another part of it, does not constitute a Congressional waiver of immunity from suit or confession of liability for the consequences of building the dam.

We pass, then, to the question of whether there has been a taking of the plaintiff's land within the meaning of the Constitution. The plaintiff relies strongly upon the case of United States v. Causby, 328 U. S. 256. In that case this court and the Supreme Court
52 held that the United States by regularly flying planes over Causby's land at so low an altitude that it became impossible to use the land as a chicken farm, though it was still possible to use it for many other purposes, had "taken" an interest in the land in the nature of an easement, and was, under the Constitution, obligated to compensate Causby according to the scope and duration of the interest taken. This case shows that in the thinking of the courts, the idea of a "taking" in the constitutional sense is not limited to the assertion of one of a closed list of normal interests in land, such as easements of passage along the surface of land, easements of flowage, constant or intermittent, profits a prendre to take minerals or other substance from land, etc. In the Causby case the Supreme Court, in remanding the case to this Court, directed this court to describe with precision the interest taken by the Government and its duration, so that there may be no doubt as to what the Government will own when it has paid its judgment.

The plaintiff says that the Government's raising of the level of the water in Darglenne Creek to the point where the tubes from the plaintiff's land through the dike no longer carry off the surface water, and where the bed of the creek, formerly nearly dry in most seasons, does not carry off the underground water from the plaintiff's land, amounts to a "taking" of an interest in the plaintiff's land. We think that the plaintiff's contention is sound. One of the valuable incidents of the plaintiff's ownership, before the dam was built, was that the surface and underground water passed off his land leaving it available for profitable agriculture. That incident has now been impaired, in order to benefit navigation on the Mississippi. It is the kind of an incident of ownership that

could have been granted by the plaintiff to the Government or a neighbor, the privilege of holding surface and underground water in the plaintiff's land, to its detriment as agricultural land. Such a grant would have created a burden in rem upon the plaintiff's land, which would have passed to subsequent owners and bound them. We see no real difference between burdening the land by artificially flooding it with water, which has often been held to be a taking,[1] and converting it into a pond or a marsh by preventing the surface water which falls on it or flows on it from higher land from leaving it by either surface or underground drainage. We think that the fact that the change in the nature of the plaintiff's land has been accomplished principally by erecting a water barrier at its margin, preventing egress of water, rather than by causing the invasion of the land by water from outside, should not be the deciding factor.

The problem of the present weight of the case of United States v. Cress, 243 U. S. 316, arises. Dardenne Creek, which loops around the plaintiff's land and which furnished its natural drainage of surface and underground water, was a nonnavigable stream. But it empties into the Mississippi only about a mile and a half from the plaintiff's land. Cress's mill, the usefulness of which was destroyed by the raising of the water level in his case, was located on a nonnavigable stream. He was allowed to recover. The court's discussion in that case indicated that property owners even on the navigable river which was being directly improved by the dam in question there, were entitled to compensation for their interests destroyed by the raising of the water level. But the Court in United States v. Chicago, M. St. P. and P. R. Co., 312 U. S. 592, held that the Government, in the improvement of the navigability of a navigable stream, could with impunity raise the water level permanently to the ordinary high-water mark, and that owners on the navigable stream whose property was inundated thereby could not recover. The court said "What was said in the Cress case must be confined to the facts there disclosed."

In the case of Willow River Power Co. v. United States, 324 U. S. 499, the court held that a power company which had dammed a nonnavigable stream at the point where it flowed into a navigable stream in order to produce power from the fall of the water from the pool created by the dam to the natural level of the water in the navigable stream, was not entitled to compensation when the Government raised the level of the navigable stream to the point where the fall was not sufficient to create as much power as before.

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[1] *Pumpelly* v. *Green Bay Company*, 13 Wall. 166; *United States* v. *Lynah*, 188 U. S. 445; *United States* v. *Welch*, 217 U. S. 333; *United States* v. *Dickinson*, 152 F. (2d) 865, aff'd 67 S. Ct. 1382.

These cases may indicate that the Cress case does not have a good prospect of survival. But it has not been overruled.
54 In the instant case, as in the Cress case, the harm was done by the raising of the water level in a nonnavigable stream, and the Government was not privileged, in the improvement of the navigability of the Mississippi, to "take" without compensation the interest which we have discussed above in the plaintiff's land on Dardenne Creek.

The plaintiff is entitled to recover $22,519.60.

It is so ordered.

HOWELL, Judge; LITTLETON, Judge; and JONES, Chief Justice, concur.

WHITAKER, Judge, dissenting:

I am unable to concur in the opinion of the majority. Whatever might have been the plaintiff's right to recover if the level of the Mississippi River had been raised above high-water mark, it is settled by numerous cases in the Supreme Court that it is not entitled to recover for any damage to its property, or for the destruction of it even, if the river is not raised above the high-water mark. United States v. Chicago, Milwaukee, St. Paul & P. Railroad Co., et al., 312 U. S. 592, and cases there cited; also Willink v. United States, 240 U. S. 572; United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53, 62, 63; and other cases cited in the opinion of this court in Kelley's Creek & Northwestern Railroad Co. v. United States, 100 C. Cls. 396. The findings in this case show that the level of the Mississippi River was not raised above high-water mark. If it was not, the injury to plaintiff's property is damnum absque injuria.

The majority opinion says, however, that this rule does not apply since this property was not on the riverbank of the navigable stream, but on a nonnavigable tributary. It says this holding it required by United States v. Cress, 243 U. S. 316. The authority of this case has been twice limited to its particular facts (United States v. Chicago, Milwaukee, St. Paul & P. Railroad Co., supra; United States v. Willow River Power Co., 324 U. S. 499); but the majority says it has not been overruled and that the present case is governed by it, since plaintiff's property was not on the riverbank of the navigable stream but on a nonnavigable tributary.

This, it seems to me, makes no difference. If the Government is immune from damage to a plaintiff's property situated on
55 the bank of the river because it was below high-water mark, why should it not be also immune from damage to property on an estuary of the river a mile distant from the riverbank, if it also was below high-water mark of the navigable river? If the

rule as to property on the riverbank is correct, it seems to me that it is a necessary corollary that property distant from the riverbank but within its flow also comes within the rule.

Water insists on finding its own level. It climbs an embankment if it has no outlet; if it has an outlet it flows into it; the water "backs up" into the estuary until the water in it and in the river is on the same level. This it does in the river's natural state in times of high water, and continuously after a dam has been erected. In the natural state of the river the land on an estuary is no less inundated in times of high water than the lands adjacent to the riverbank. What the dam does it to make continuous what nature did only intermittently; but the effect on property on the bank and on the estuary is exactly the same.

Why the defendant should be immune from liability for damage to the one and liable for damage to the other I am wholly unable to see.

I cannot imagine that the Supreme Court intended to draw such a distinction. It does not appear from the opinion in United States v. Cress, supra, whether or not the level of the navigable river was raised above high-water mark. I assume it was, since, otherwise, it appears to me this opinion would be clearly in conflict with the cases cited in United States v. Chicago, Milwaukee, St. Paul & P. Railroad Co., supra, and others.

At any rate, I am unwilling to conclude that this opinion means to draw such a distinction which to me seems so wanting in reason or logic. Unless we ascribe to it such an intention, it is clearly in conflict with later, as well as earlier, decisions of the Court.

It may be true that the original rule is wrong, that as an incident to the power to regulate commerce between the States, the Government can raise the constant level of a navigable river to its high-water mark without incurring liability to property owners on the banks of the river whose property is thereby continuously inundated, whereas before it was subject only to intermittent overflows; but if this rule is to be adhered to then it must follow that it does not incur liability to a property owner whose property is
56 on an estuary of the river but within its flow in high water in the river's natural state.

The original rule is so firmly implanted in the decisions of our courts that it should not be overturned except by Act of Congress. That being the law, I think this plaintiff is debarred from recovery.

57 *Note re exhibits*

The following original exhibits made a part of the findings of this court accompany this record under separate cover:

Defendant's Exhibit No. 4.

Defendant's Exhibit No. 7.
Plaintiff's Exhibit No. 12.

59 *Judgment of the court*
(Dec. 1, 1947)

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of twenty-two thousand, five hundred nineteen dollars and sixty cents ($22,519.60).

61 *Proceedings after entry of judgment*

On January 26, 1948, the plaintiff filed a motion for a new trial.

On February 2, 1948, the court entered the following order on said motion:

ORDER

This case comes before the Court on plaintiff's motion for a new trial, and on consideration thereof:

It is ordered this 2nd day of February 1948, that said motion be and the same is allowed. The conclusion of law filed herein December 1, 1947, is this day amended by adding at the end thereof the following:

"together with interest at four percent per annum as a part of just compensation from August 8, 1938, until date of payment."

It is further ordered that there be added at the end of the next to the last line of the opinion, on page 22, the following:

63 "together with interest at four percent per annum as a part of just compensation from August 8, 1938, until date of payment."

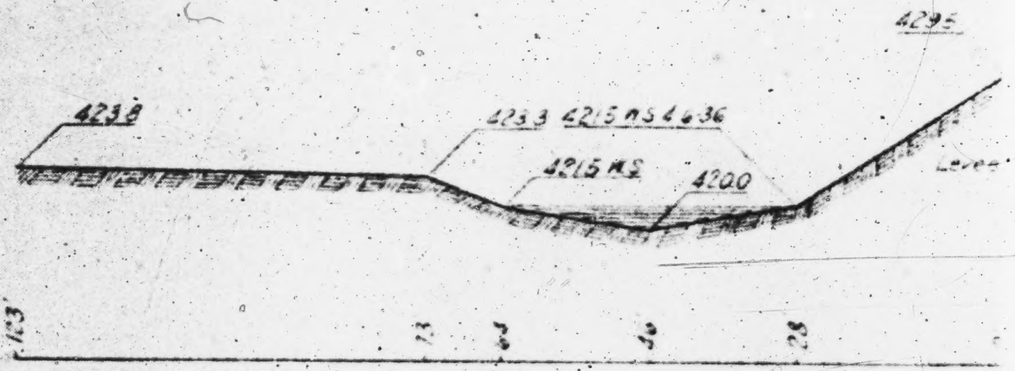
The conclusion of law and opinion as amended, and the findings of fact heretofore filed, are to stand.

By the Court.

(S) MARVIN JONES,
Chief Justice.

65 [Clerk's certificate to foregoing transcript omitted in printing.]

1-1



SECTION A-A

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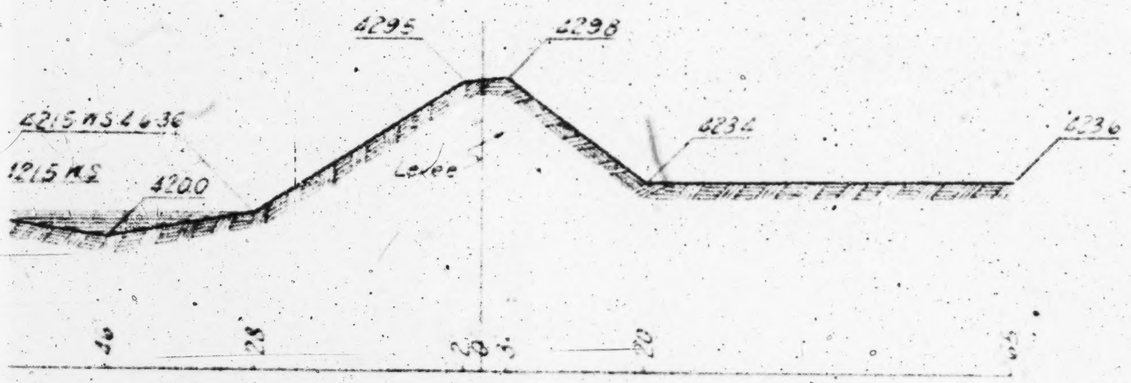

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SECTION A-A

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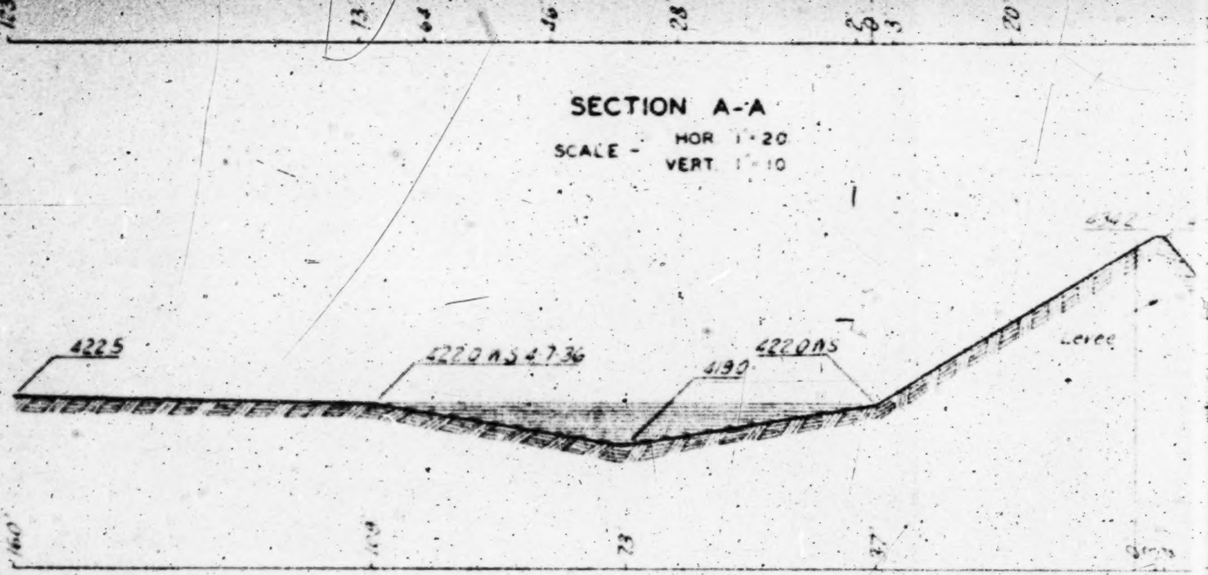

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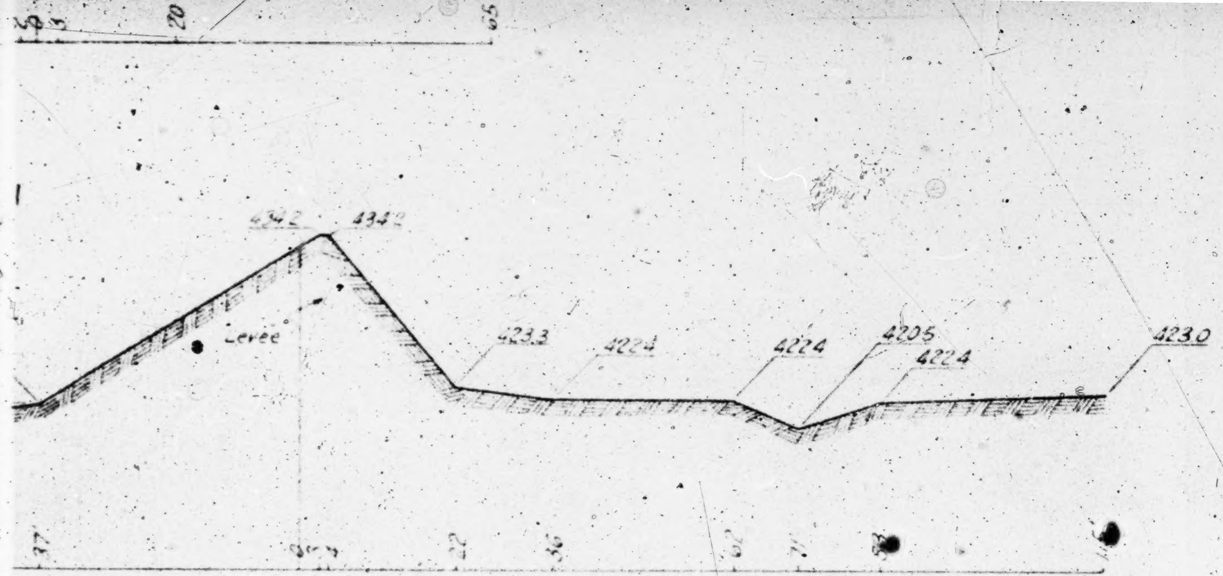

SECTION B-B

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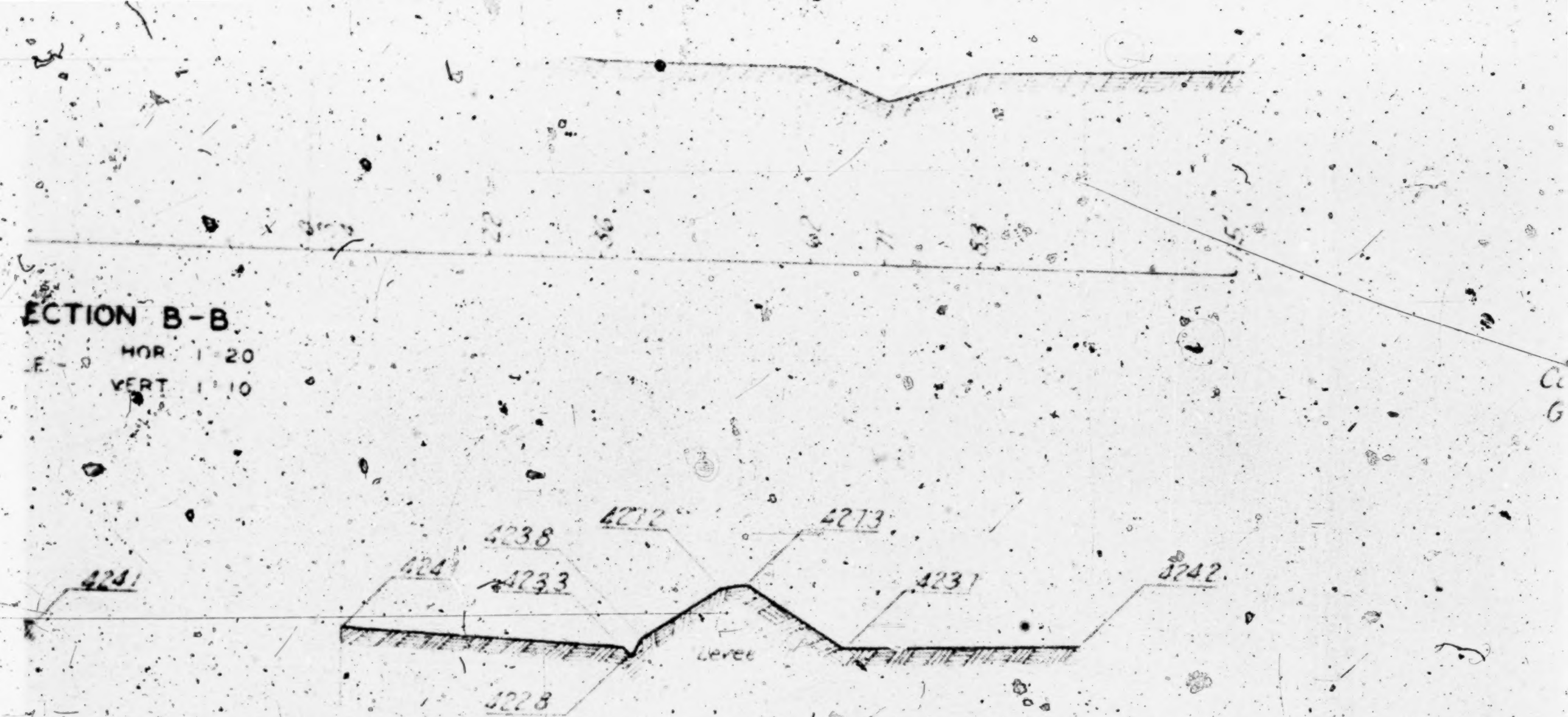
SECTION C-C

SCALE - HOR 1 = 20
VERT 1 = 10

ECTION B-B

E - D HOR 1 : 20

VERT 1 : 10



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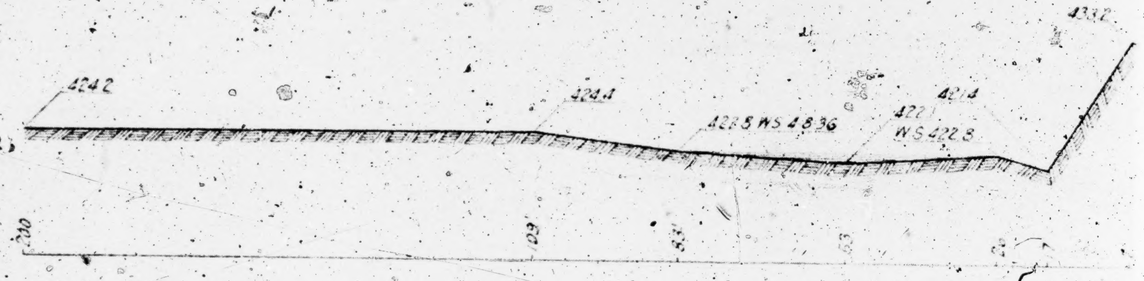

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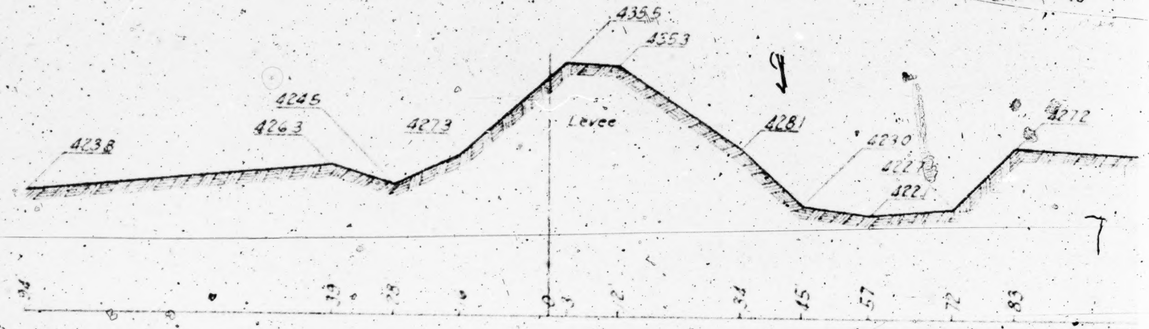

SECTION F-F

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SECTION D-D

SCALE - HOR 1" = 20'
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SECTION E-E

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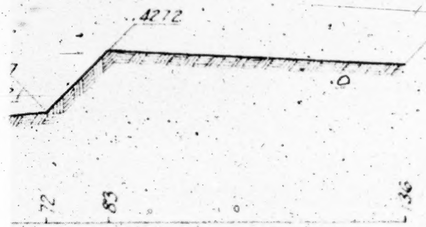
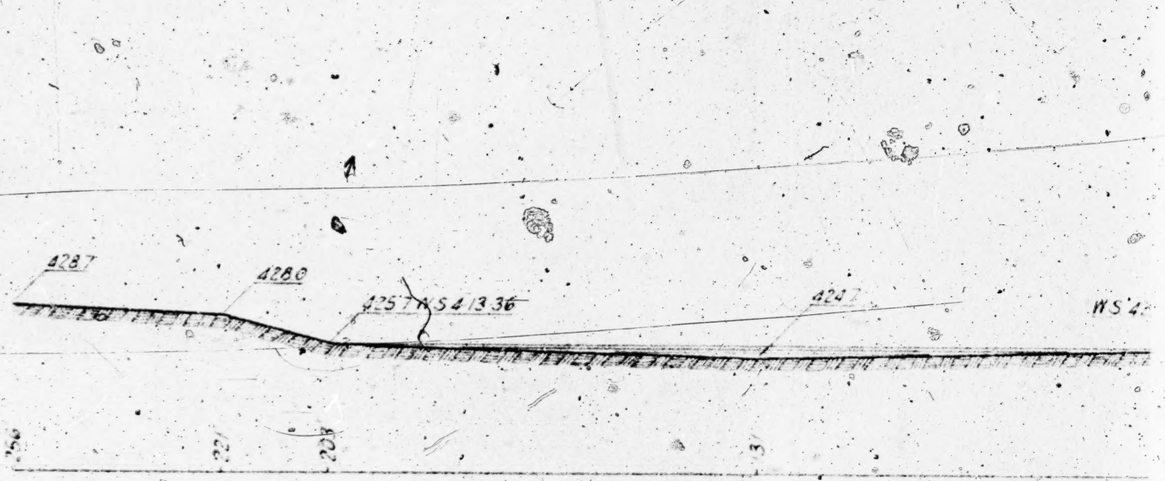


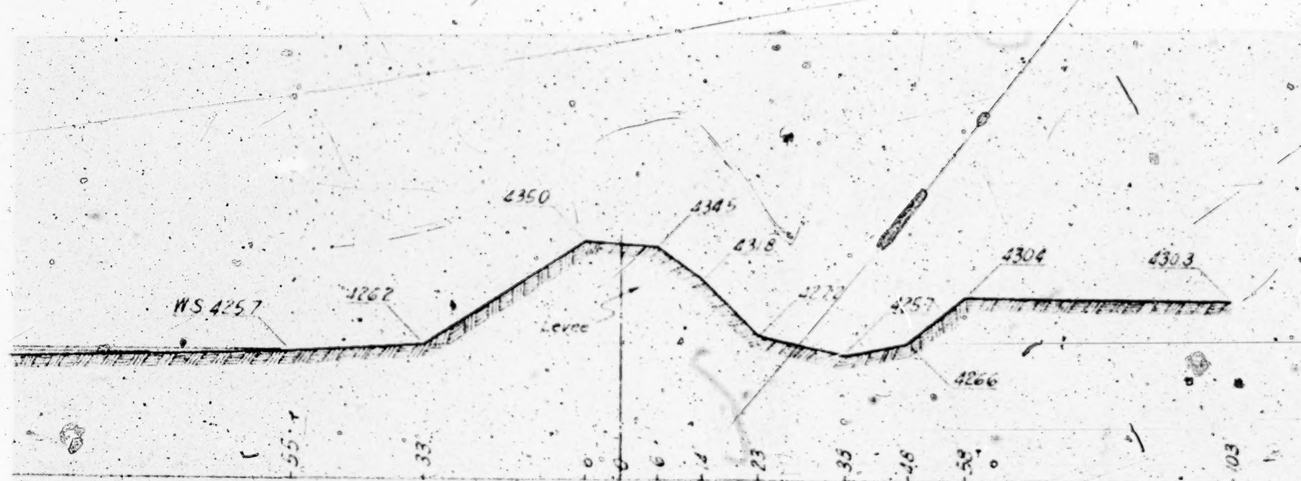
South End View of 2-30" CIP and 2-4'-4" Wooden Flood Gates. Location of Pipes is Shown in Detail "C"

Scale 1"=10'



SECTION G-

SCALE - HOR
VERT



SECTION G-G

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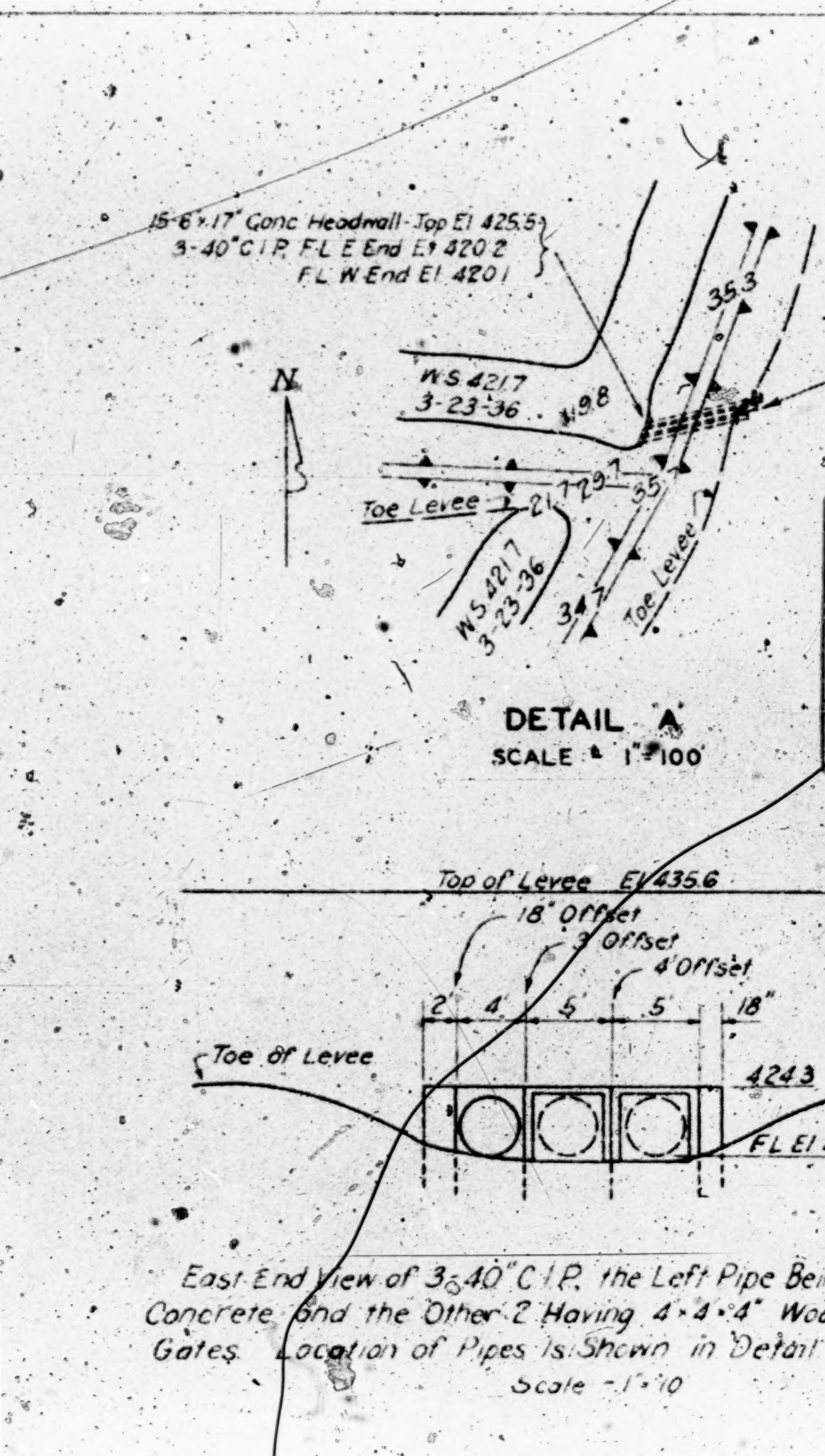
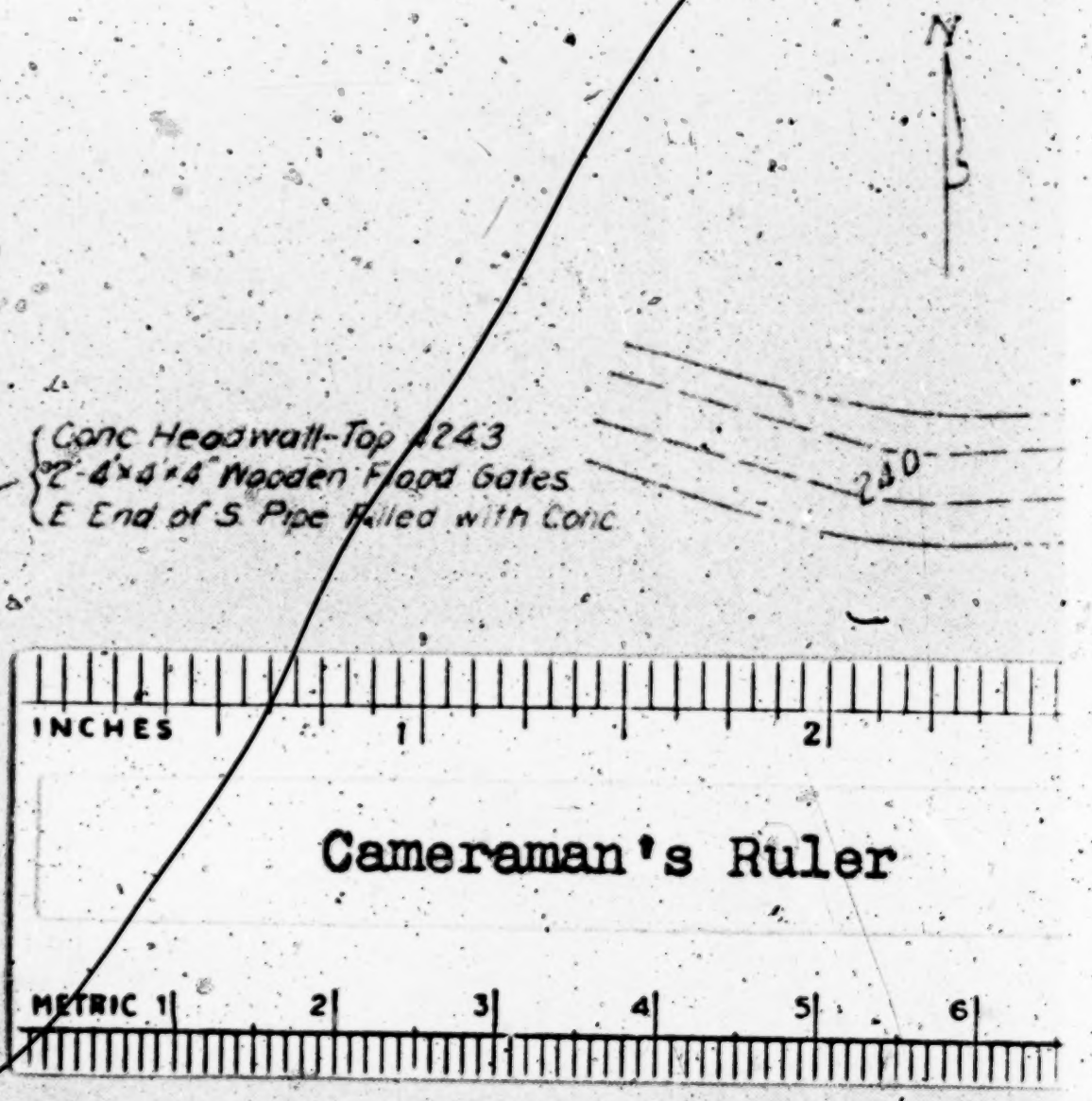
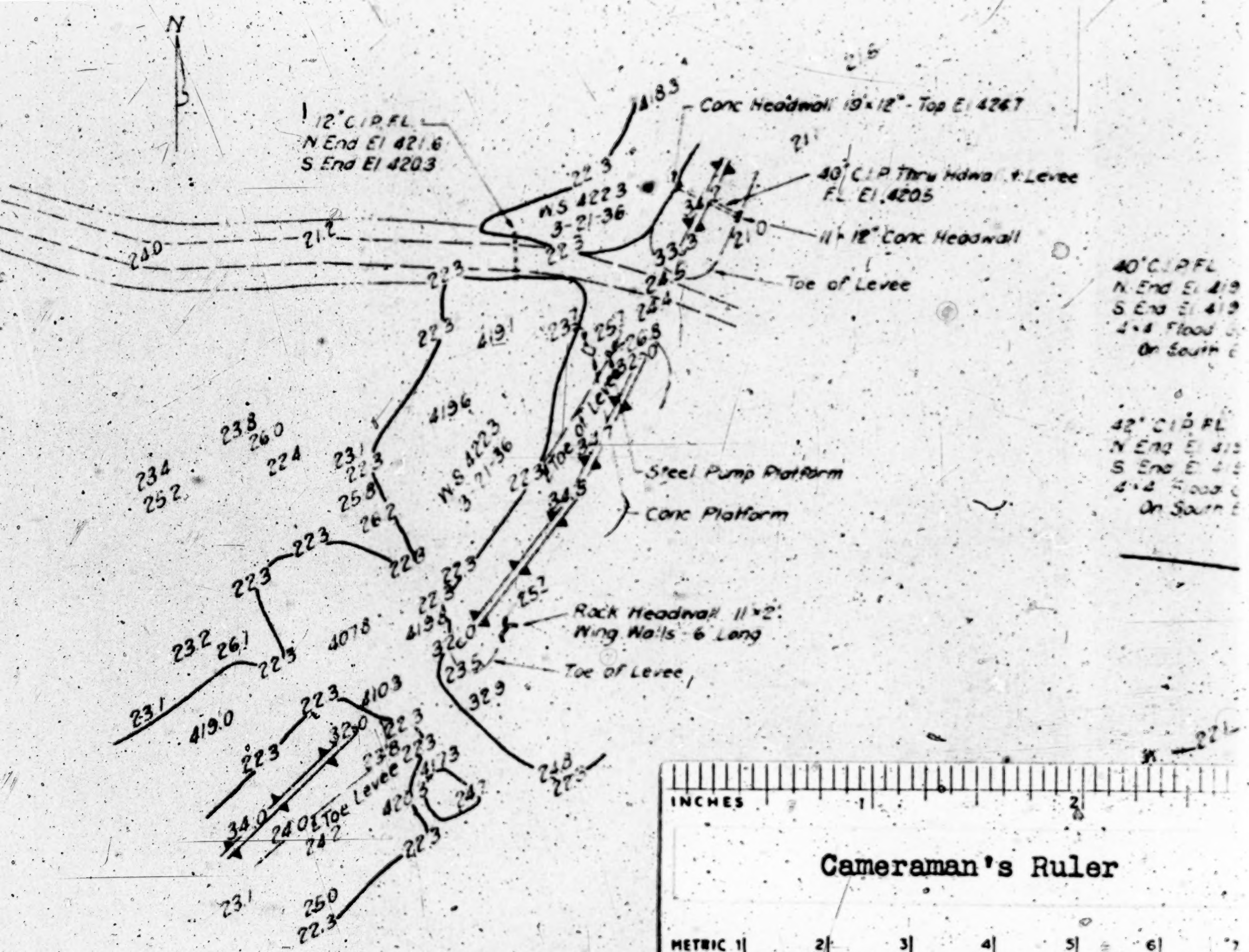
W-1



East End View of 3-40" C.I.P. the Left Pipe Being Filled with Concrete and the Other 2 Having 4'x4'x4" Wooden Flood Gates. Location of Pipes is Shown in Detail "A"

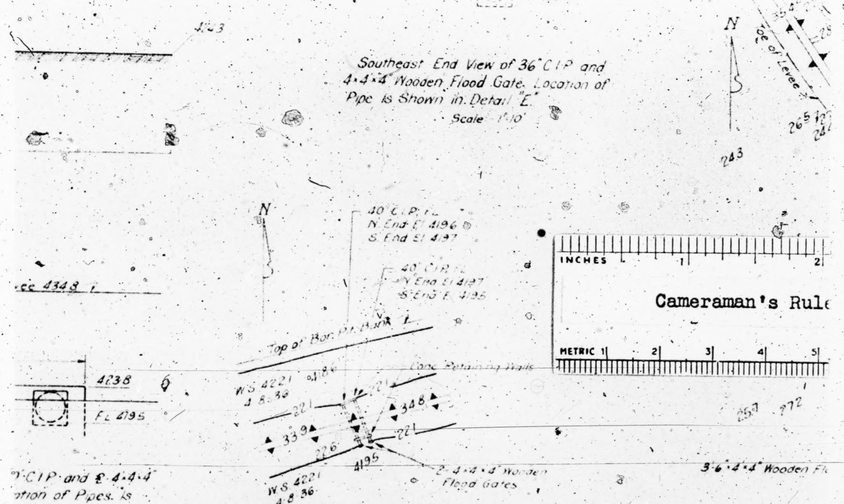
Scale - 1"=10

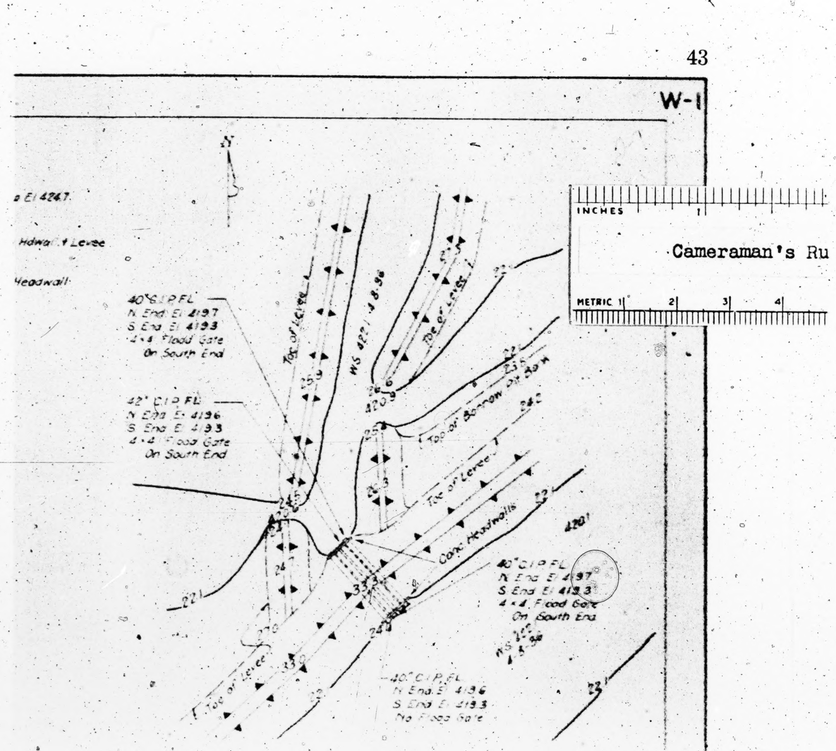


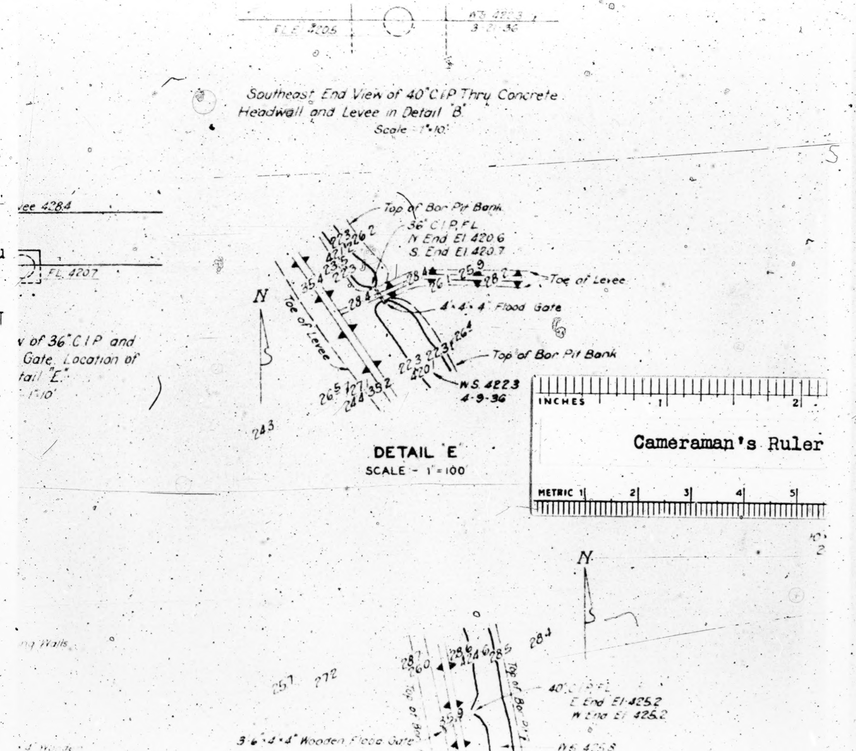


DETAIL B

SCALE - 1" = 100'


Southeast End View of 36"C.I.P. and 4'-4"x4" Wooden Flood Gate. Location of Pipe is Shown in Detail 'E'
Scale 1"=10'
40" C.I.P. F.L.
N. End El. 4196
S. End El. 4197
Top of Bor Pit Bank
Conc. Retaining Walls
W.S. 4221
4-8-36
4238
F.L. 4195
2-4'-4" Wooden Flood Gates
3'-6"x4'-4" Wooden Fl
DETAIL 'C'
SCALE - 1"=100'
INCHES
METRIC
Cameraman's Rule


W-1
Top of Levee
Headwall
40"C.I.P.F.L.
N. End El. 4197
S. End El. 4193
4'x4' Flood Gate
On South End
42" C.I.P. F.L.
N. End El. 4196
S. End El. 4193
4'x4' Flood Gate
On South End
W.S. 4221
4-8-36
Top of Borrow Pit
Conc. Headwalls
40"C.I.P.F.L.
N. End El. 4197
S. End El. 4193
4'x4' Flood Gate
On South End
40"C.I.P.F.L.
N. End El. 4196
S. End El. 4193
No Flood Gate
INCHES
METRIC
Cameraman's Ru


Southeast End View of 40"C.I.P. Thru Concrete Headwall and Levee in Detail 'B'
Scale 1"=10'
Top of Bor Pit Bank
36" C.I.P. F.L.
N. End El. 4206
S. End El. 4207
Toe of Levee
4'-4"x4' Flood Gate
Top of Bor Pit Bank
W.S. 4223
4-9-36
DETAIL 'E'
SCALE - 1"=100'
INCHES
METRIC
Cameraman's Ruler
40" C.I.P.F.L.
E. End El. 4252
W. End El. 4252
3'-6"x4'-4" Wooden Flood Gate

NS 4223
4-9-36

DETAIL E
SCALE - 1" = 100

Toe of Levee

INCHES 1 2

METRIC 1 2 3 4 5

• Cameraman's Rule

N

40" C I P
E End El 4252
W End El 4252

Top of Bor Pit

NS 4256
4-13-36

3'-4"x4'-4" Wooden Flood Gate

Top of Bor Pit

DETAIL F
SCALE - 1" = 100

Top of Levee 4359 ±

Approx Toe of Levee and Top of Bor Pit Bank 4290 ±

Approx ℄ Bor Pit 4260 ± El 4252

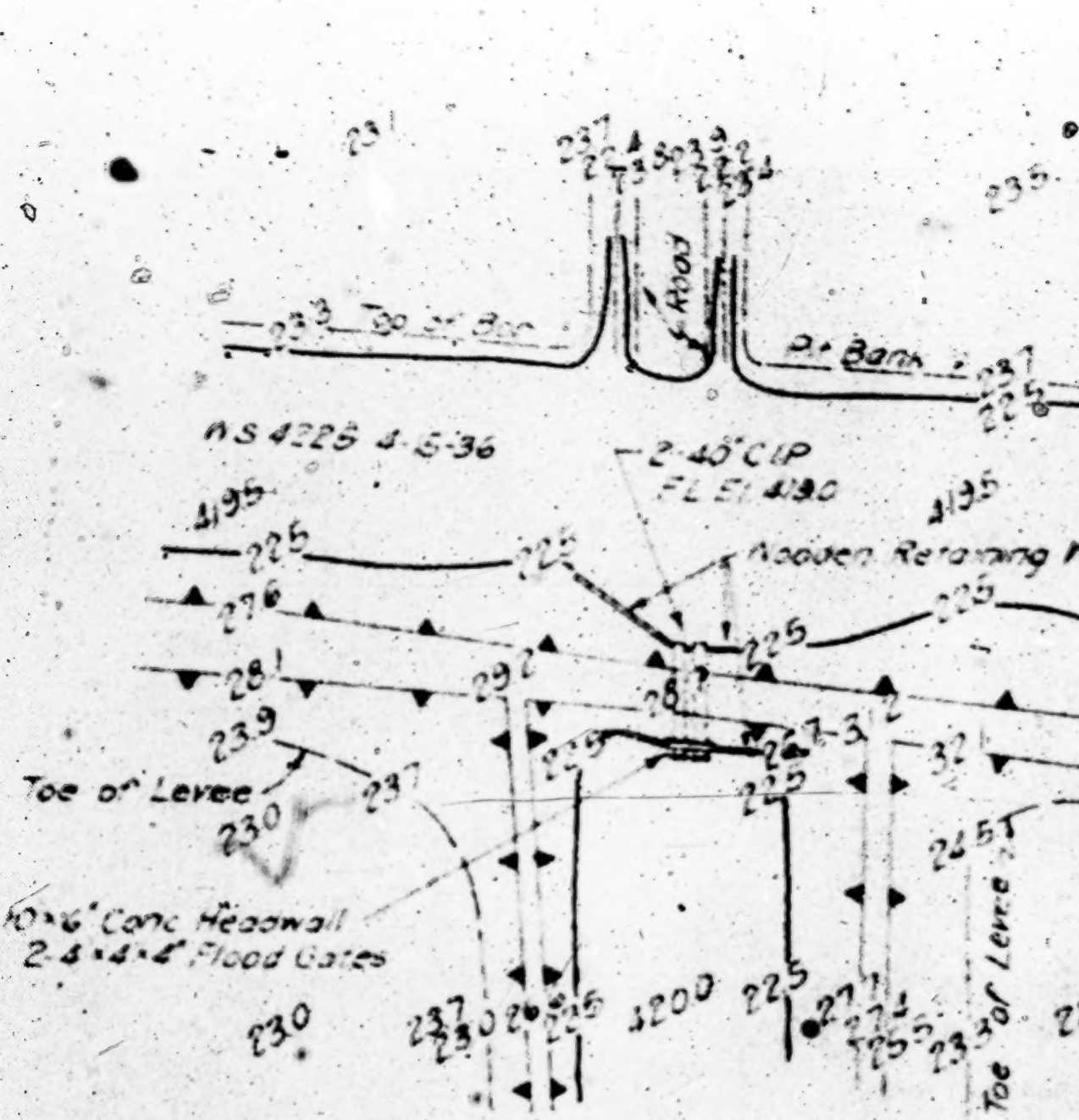
West End View of 40" C I P and 3'-6"x4'-4" Wooden Flood Gate. Location of Pipe is Shown in Detail "F"
Scale - 1"=10'

Sou
Flood

FOR LOC

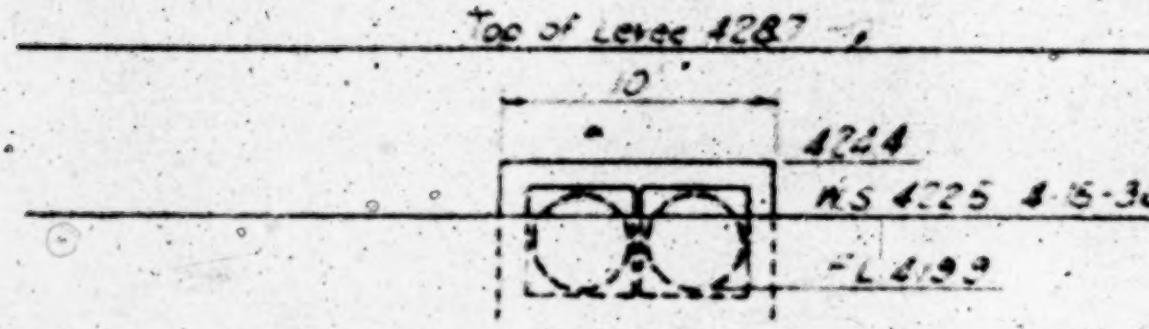
N

DETA



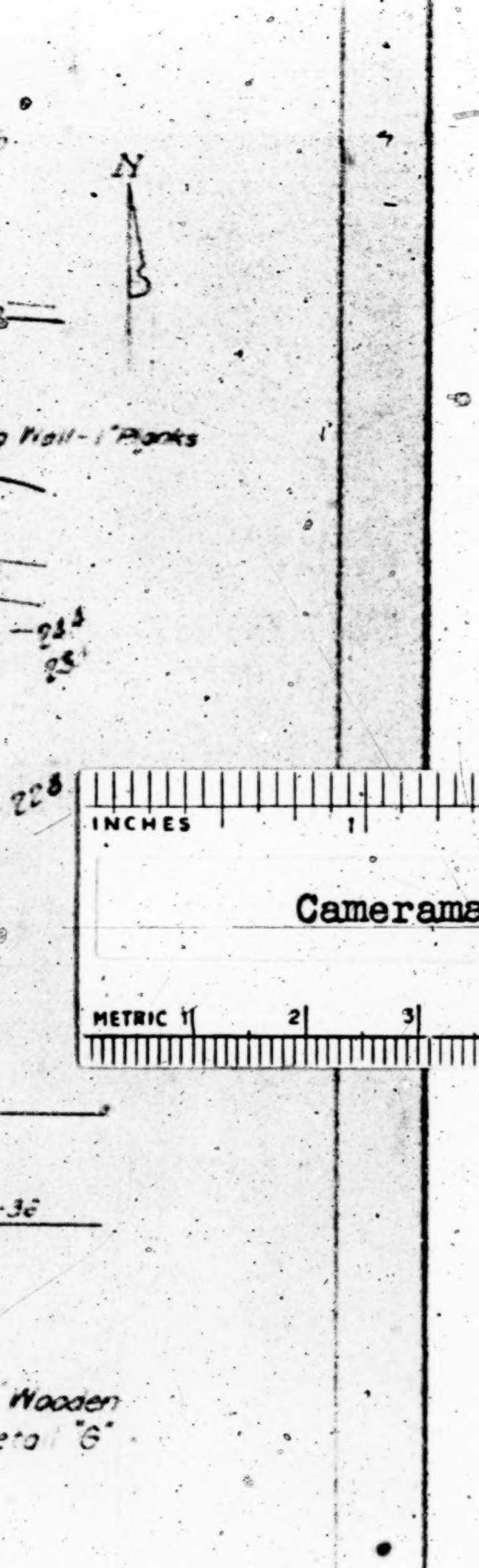
DETAIL 'G'

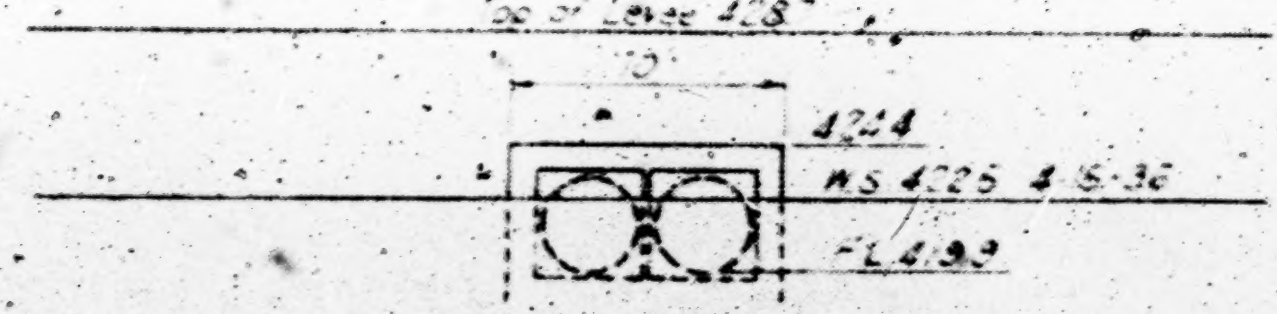
SCALE - 1"=50'



South End View of 2-40" CIP and 2-4'x4' W
Flood Gates Location of Pipes is Shown in Det

Scale - 1"=10'


N
INCHES
1
Camerama
METRIC
2
3
Wooden



South End View of 2-40" C.I.P. and 2-4'x4' Wooden Flood Gates Location of Pipes is Shown in Detail "B"

Scale - 1"=10

FOR LOCATION OF DETAILS AND SECTIONS SEE SHEET W

MISSISSIPPI RIVER
LOCK & DAM NO. 26
DETAILS OF WIEDMER DRAINAGE DISTRICT.

IN SHEETS SHEET NO.

SCALE AS SHOWN

U. S. ENGINEER OFFICE. ST. LOUIS, MO. DEC 17 1936

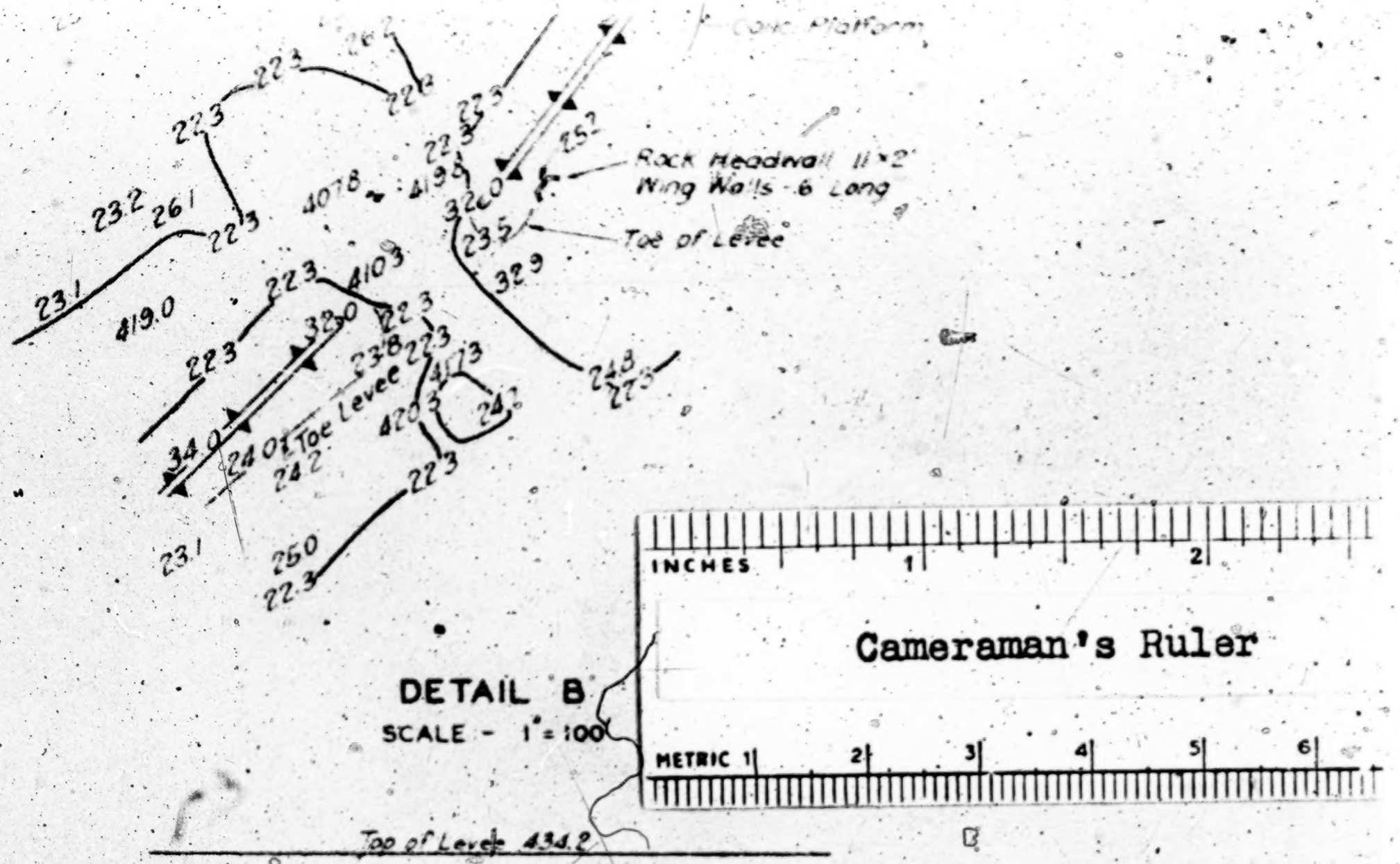
SUBMITTED M C Lewis ENGINEER

APPROVED [illegible] LT COL CORPS OF ENGINEERS DISTRICT ENGINEER

DRAWN BY L.T.B CHECKED BY G.W.H FILE NO

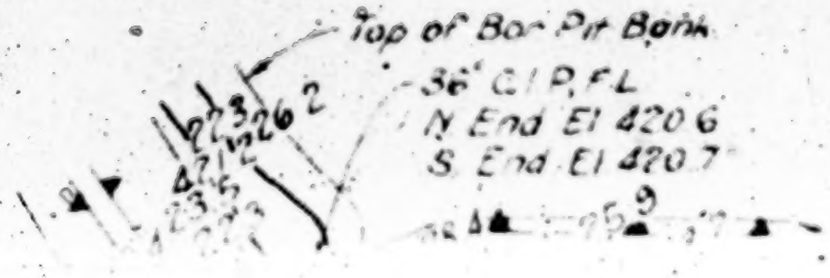
W-1

Government Exhibit No. 8



DETAIL B
SCALE - 1" = 100'

Southeast End View of 40" C.I.P. Thru Concrete Headwall and Levee in Detail "B"
Scale - 1"=10'



evee 428.4

FL 4207

In the Supreme Court of the United States

October Term, 1947

No. 621

UNITED STATES OF AMERICA, PETITIONER

v.

KANSAS CITY LIFE INSURANCE COMPANY, A CORPORATION

On Petition for a Writ of Certiorari to the Court of Claims

Stipulation dispensing with printing of certain exhibits

Plaintiff's Exhibit No. 12 and Defendant's Exhibit No. 4 are large maps of the land in suit. Because of their size and because of the colors thereon, it would be inordinately expensive to reproduce such exhibits.

It is therefore stipulated and agreed, subject to this Court's approval, by and between counsel for the respective parties hereto, that such exhibits need not be printed in the record but may be considered a part of the record, and may be referred to by the Court or by counsel in the petition, briefs, and on oral argument.

PHILIP B. PERLMAN,
Counsel for Petitioner.

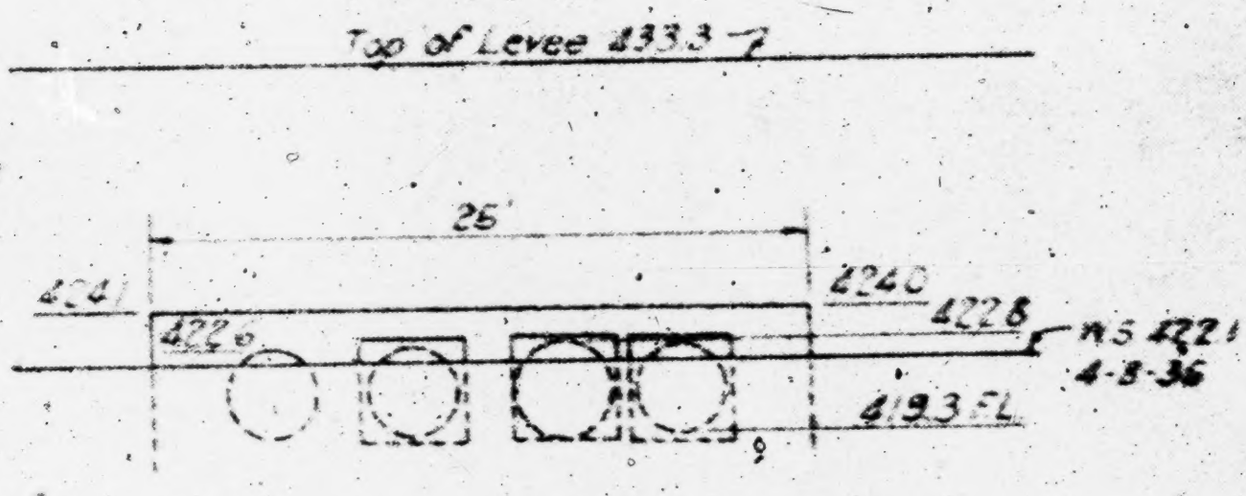
RAY B. LUCAS,
STANLEY BARRETT,
Counsel for Respondent.

U. S. GOVERNMENT PRINTING OFFICE 1948

N End El 4136
S End El 4193
No Flood Gate

DETAIL 'D'

SCALE - 1"=50'



Southeast End Elev of 1-42" and 3-40" C I P and 2-8'x4' Wooden Flood Gates Location of Pipes is Shown in Detail 'D'

Scale 1"=10'